

S. HRG. 109-432

**ORBACH, KARSNER, SPURGEON, AND BERNHARDT
NOMINATIONS**

**HEARING
BEFORE THE
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
ONE HUNDRED NINTH CONGRESS
SECOND SESSION
ON**

THE NOMINATIONS OF RAYMOND L. ORBACH, TO BE UNDER SECRETARY FOR SCIENCE, DEPARTMENT OF ENERGY; ALEXANDER A. KARSNER, TO BE ASSISTANT SECRETARY FOR ENERGY EFFICIENCY & RENEWABLE ENERGY, DEPARTMENT OF ENERGY; DENNIS R. SPURGEON, TO BE ASSISTANT SECRETARY OF NUCLEAR ENERGY, DEPARTMENT OF ENERGY; AND DAVID LONGLY BERNHARDT, TO BE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR

MARCH 9, 2006



Printed for the use of the
Committee on Energy and Natural Resources

U.S. GOVERNMENT PRINTING OFFICE
28-197 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON ENERGY AND NATURAL RESOURCES

PETE V. DOMENICI, New Mexico, *Chairman*

LARRY E. CRAIG, Idaho	JEFF BINGAMAN, New Mexico
CRAIG THOMAS, Wyoming	DANIEL K. AKAKA, Hawaii
LAMAR ALEXANDER, Tennessee	BYRON L. DORGAN, North Dakota
LISA MURKOWSKI, Alaska	RON WYDEN, Oregon
RICHARD BURR, North Carolina	TIM JOHNSON, South Dakota
MEL MARTINEZ, Florida	MARY L. LANDRIEU, Louisiana
JAMES M. TALENT, Missouri	DIANNE FEINSTEIN, California
CONRAD BURNS, Montana	MARIA CANTWELL, Washington
GEORGE ALLEN, Virginia	JON S. CORZINE, New Jersey
GORDON SMITH, Oregon	KEN SALAZAR, Colorado
JIM BUNNING, Kentucky	

BRUCE M. EVANS, *Staff Director*

JUDITH K. PENSABENE, *Chief Counsel*

ROBERT M. SIMON, *Democratic Staff Director*

SAM E. FOWLER, *Democratic Chief Counsel*

C O N T E N T S

STATEMENTS

	Page
Allen, Hon. George, U.S. Senator from Virginia	1
Bernhardt, David Longly, Nominee to be Solicitor of the Department of the Interior	13
Bingaman, Hon. Jeff, U.S. Senator from New Mexico	3
Cantwell, Hon. Maria, U.S. Senator from Washington	2
Karsner, Alexander A., Nominee to be Assistant Secretary for Energy Effi- ciency & Renewable Energy, Department of Energy	7
Nalley, E. Ann, President, American Chemical Society	21
Orbach, Dr. Raymond L., Nominee to be Under Secretary for Science, Depart- ment of Energy	6
Spurgeon, Dennis R., Nominee to be Assistant Secretary for Nuclear Energy, Department of Energy	11

APPENDIX

Responses to additional questions	23
---	----

ORBACH, KARSNER, SPURGEON, AND BERNHARDT NOMINATIONS

THURSDAY, MARCH 9, 2006

**U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
*Washington, DC.***

The committee met, pursuant to notice, at 10:11 a.m., in room SD-366, Dirksen Senate Office Building, Hon. Pete V. Domenici, chairman, presiding.

OPENING STATEMENT OF HON. GEORGE ALLEN, U.S. SENATOR FROM VIRGINIA

Senator ALLEN [presiding]. The Energy Committee will come to order. Senator Domenici is tied up in the Budget Committee right now arguing for various matters that actually have to do with energy matters in budget. And so, he asked me to chair the committee. And of course we have Senator Bingaman co-chairing as well.

We're here this morning to consider the following nominations for positions within the Department of Energy. Raymond Orbach, to be Undersecretary of Science; Alexander Karsner, to be Assistant Secretary for Energy Efficiency and Renewable Energy; Dennis Spurgeon, to be Assistant Secretary for Nuclear Energy; and we'll also consider the nomination of David Longly Bernhardt to be Solicitor of the Department of the Interior.

I welcome all of you to the committee, and congratulate each of you for your nominations. I was going to be here anyway to introduce Mr. Karsner, who I've known for several years. Especially since he's made Alexandra, Virginia his home. His wonderful wife Maria is here undoubtedly. There you are. And their growing family. He has a very impressive record, and we'll have others make introductions. But, let me just say that Mr. Karsner has a very impressive record on energy issues. Not just here in this continent, in this country, but all over the world. Understanding the importance of renewables, creative innovations and distribution. His entire life has been one of looking at global competitiveness, and this is a competitiveness issue for us. And I think Mr. Karsner's an outstanding nomination because of his record. Understanding there are evolving technologies. And we need to also have private pathways to get those distributed around the country.

The Energy Policy Act, which this committee worked on, the Advanced Energy Initiative, and the President's recent State of the Union Address comments, underscore the urgency of greater energy

independence for our economic vitality, competitiveness, our national security, and also our environmental well being.

Mr. Karsner has so many great attributes and experiences in all those areas, that I know he's going to be an outstanding leader for this country. He's also endorsed by—or unanimously commended, depending on the situation by the National Federation of Independent Business, the U.S. Chamber of Commerce, the America Wind Energy Association, the American Council of Renewable Energy, and the CEO's of some of Virginia's leading renewable energy firms. And so, I'm very pleased to have the opportunity to say these words about Mr. Karsner. And I'm sure later he'll introduce his bride.

With that, Senator Bingaman would you like to make an opening statement?

[The prepared statement of Senator Cantwell follows:]

PREPARED STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Mr. Chairman, thank you for calling this hearing. The Department of Energy has a vital role to play in our nation achieving energy independence and providing a path forward to a secure and reliable energy supply and infrastructure. Further, the Department will have a major role in advancing America's competitiveness agenda as we seek to maintain our leadership in science and technology through the bipartisan Protecting America's Competitive Edge (PACE) Act which I hope will pass during this session of the 109th Congress. I was pleased that this Committee was able to pass the PACE-Energy Act just yesterday.

Dr. Orbach, I want you to know that the State of Washington is proud to be the home of the Pacific Northwest National Laboratory. PNNL's research and development portfolio is important to many of the issues facing this country—ranging from nuclear non-proliferation to energy R&D to biology and health programs. The Environmental Molecular Sciences Laboratory is a critical national user facility and is unique with its instrumentation and capabilities. I was proud to be present for the dedication of the nuclear magnetic resonance spectrometer early in my term as Senator.

Dr. Orbach, you are aware of the critical issue facing PNNL with regard to replacement of its facilities as a result of the need to clean up the 300 Area. The Hanford clean up is a significant issue for the State of Washington and it is critical that the Department fulfill its legal and moral commitment to complete cleanup. It is equally important that the Department hold true to its commitment of replacing the critical laboratories that are going to be affected by the 300 Area clean up. As you know, there is a multi-pronged solution which includes the Federal government, under your leadership. The State of Washington is putting up money for the Bioproducts, Sciences, and Engineering Laboratory (BSEL). The Battelle Memorial Institute, which manages PNNL for the Department, is continuing to invest in facilities that will be a part of the solution. I look forward to Department's support in making the Pacific Northwest National Laboratory an enduring presence at Hanford long after clean up is completed and the 300 Area is returned to its natural state.

I also want to recognize Mr. Karsner who is the nominee for the position of Assistant Secretary for Energy Efficiency and Renewable Energy. The State of Washington has a very unique in its energy portfolio with a diverse set of production options and a strong commitment to energy conservation. The State of Washington is committed to the utilization of bioproducts as an energy source. In fact, the Bioproducts, Sciences, and Engineering Laboratory will be a state-of-the-art laboratory funded by the State of Washington with programs provided by the Federal Government that will be on the cutting edge of bioproducts research. The Pacific Northwest National Laboratory makes important and significant contributions to the Office of Energy Efficiency and Renewable Energy including the Biomass, Vehicle Technologies, Hydrogen and Fuel Cell, and Building Technologies Programs. I invite you to make a visit to the State at your earliest convenience to see the research programs, not only at PNNL, but in other parts of the State.

Of critical importance to me is moving our country towards the development of new technologies that will reduce our reliance on foreign oil, lead to increased energy efficiency and conservation, and at the same time preserve our environment. I believe the State of Washington is very interested in playing a leadership role as

we work toward those goals. I look forward to working with all of the nominees in achieving our mutual goals of energy independence and energy security.

Thank you Mr. Chairman.

**STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR
FROM NEW MEXICO**

Senator BINGAMAN. Well, Mr. Chairman thank you for having the hearing. I welcome all the nominees, and am particularly glad that we are conducting a hearing on the new positions that we created in last years bill. The Under Secretary for Science and the Assistant Secretary for Nuclear Energy are both very important positions. Dr. Orbach and Mr. Spurgeon are two experienced and highly qualified nominees for those new jobs, and I'm very glad to see their nominations. I also look forward to hearing from Mr. Karsner and Mr. Bernhardt, who've been nominated to fill older, but very important positions in the Department, in the Federal Government as well.

The Office of Solicitor, to which Mr. Bernhardt has been nominated, of course is responsible for the interpretation and application of all legal authority affecting actions proposed or taken under the Department of the Interior's programs and operations. So, it's a very important position, and I do have some questions of Mr. Bernhardt on a couple of pending issues. Thank you.

Senator ALLEN. Thank you, Senator Bingaman. Before we have you all swear in, to give you all some happiness and bring smiles to your faces. I know many of you all have members of your family present. And if you would, could you introduce them to us. We'll proceed in the order in which you're seated at the table. But, Mr. Orbach if you could—whatever family members or close friends that have come to watch these proceedings, if you'd please introduce them to us.

Dr. ORBACH. Thank you, Senator Allen. Thank you, Senator Bingaman. I'd like to introduce, first to the committee me wife of 49 years. We'll be celebrating our 50th anniversary this year, Eva.

Senator ALLEN. Eva please—Eva welcome. Good to have you here.

Dr. ORBACH. And then we've been blessed with three children. And we have 10 grandchildren. And I'm very pleased to have our oldest son, David here. And two of our grandchildren, Grant and Kevin.

Senator ALLEN. Welcome.

Dr. ORBACH. And then we have two very close friends, the Glatt's, Milton and Barbara Glatt, who we brought with us.

Senator ALLEN. Okay.

Dr. ORBACH. And I would also like to thank Deputy Secretary Clay Sell, who has come to this hearing—and for all his support, and also my two senior staff, Jeff Salmon and Todd Harding. Thank you.

Senator ALLEN. Thank you, Mr. Orbach. Mr. Karsner. I've already brought up Maria, but she can stand up if she'd like.

Mr. KARSNER. I'm pleased to introduce—first of all, thank you Senator Allen for the kind introduction. And a belated happy birthday to you.

Senator ALLEN. Thank you.

Mr. KARSNER. I'd like to introduce my bride, Maria. And our two kids, Jenny and Caroline. It's their first hearing as well.

Senator ALLEN. Welcome.

Mr. KARSNER. My parents, David and Blanche Karsner, who've come up from Texas.

Senator ALLEN. Good to see you all. I know you're proud of your son.

Mr. KARSNER. My cousins who hit the red eye from Minnesota, Susie, and Bruce, and Rebecca are here.

Senator ALLEN. Welcome.

Mr. KARSNER. And there are so many friends in the room. But, I would especially like to thank Paul Dickerson and Brad Wine, who've been a real inspiration through this process. Thanks.

Senator ALLEN. Thank you. Thank you for improving the airline economy as well.

Mr. Spurgeon.

Mr. SPURGEON. Mr. Chairman, thank you. I'd like to first of all introduce my wife of only 40 years, Carroll Spurgeon. And I have my two sons here, and my two daughters-in-law. My son Dennis, his wife Cherine. And my son Scott, and his wife Monica. I have a daughter Kimberly, but Kimberly lives in London and could not be with us today. But, I would tell you I always have her support.

Senator ALLEN. Thank you. Welcome to all of you all.

Mr. BERNHARDT. My wife Gena Bernhardt is here. And my mother traveled from western Colorado to be here today, Carolyn Bernhardt.

Senator ALLEN. Where do you live in western Colorado?

Ms. BERNHARDT. I'm sorry, where?

Senator ALLEN. Yep.

Ms. BERNHARDT. In Rifle.

Senator ALLEN. In Rifle, headwaters of the Colorado River up in there.

Mr. BERNHARDT. It is.

Senator ALLEN. Pretty country. Almost as pretty as—

Senator BINGAMAN. It's close.

Senator ALLEN. Well, thank you all for being here. The rules of this committee which apply to all nominees require that they be sworn in in connection with their testimony. So, if you would all please rise, and raise you right hands. I'll go through this and then turn it over to you.

Do you solemnly swear that the testimony you're about to give to the Senate Committee on Energy and Natural Resources shall be the truth, the whole truth, and nothing but the truth?

Mr. ORBACH. I do.

Mr. KARSNER. I do.

Mr. SPURGEON. I do.

Mr. BERNHARDT. I do.

Senator ALLEN. You can be seated. Before you begin your statements, we'll be asking questions that are addressed to each nominee. And each of you will respond separately. One of the things, and I hope that you could say—affirmatively say this, is will you be able to appear before this committee or other congressional committees to represent the Department, and respond to issues of concern to the Congress?

Mr. ORBACH. Yes.
 Mr. KARSNER. Yes.
 Mr. SPURGEON. Yes.
 Mr. BERNHARDT. Yes.

They all responded for the record, affirmatively. Second, are you aware of any personal holdings, investments, or interests that could constitute a conflict or create the appearance of such a conflict, should you be confirmed and assume the office to which you have been nominated by the President?

Dr. ORBACH. My investments, personal holdings, and other interests have been reviewed. Both by myself, and the appropriate ethic counselors within the Federal Government. I've taken appropriate action to avoid any conflicts of interest. And there are no conflicts of interest or appearances thereof to my knowledge.

Senator ALLEN. Mr. Karsner.

Mr. KARSNER. My investments, personal holdings, and other interests have been reviewed. Both by myself, and the appropriate ethics counselors within the Federal Government. I've taken appropriate action to avoid any conflicts of interest. There are no conflicts of interest or appearances thereof to my knowledge.

Senator ALLEN. Mr. Spurgeon.

Mr. SPURGEON. My investments, personal holdings, and other interests have been reviewed. Both by myself, and the appropriate ethics counselors within the Federal Government. I have taken appropriate action to avoid any conflicts of interest. There are no conflicts of interest or appearances thereof to my knowledge.

Senator ALLEN. Thank you.

Mr. Bernhardt.

Mr. BERNHARDT. Senator, my investments, personal holdings, and other interests have been reviewed. Both by myself, and the appropriate ethics counselors within the Federal Government. I've taken appropriate action to avoid any conflicts of interest. There are no conflicts of interest or appearances thereof to my knowledge.

Senator ALLEN. Thank you. Let me ask you this question. Have any of you all involved with, or do you have any assets held in blind trusts?

Mr. ORBACH. No.
 Mr. KARSNER. No.
 Mr. SPURGEON. No.
 Mr. BERNHARDT. No.

The record will reflect that all witnesses answered no. Each of you now may make a brief opening statement. I encourage you to summarize your statements if you have prevented—as you have presented filing for the record. So, we'll have time for Senator's questions. But, your full statement will be made part of the record. Dr. Orbach, we'll begin with you. Followed by Mr. Karsner, Mr. Spurgeon, and Mr. Bernhardt. And I'm going to turn the gavel over as these statements begin to the chairman of the committee, Senator Domenici, who has now arrived. And thank you all so very much. Thank you, Mr. Chairman.

The CHAIRMAN [presiding]. Thank you.

Senator ALLEN. I'll just swing over here, and we'll move this out of the way.

The CHAIRMAN. I very much appreciate it.

Senator ALLEN. Glad to help.

The CHAIRMAN. All right. We're going to start now with each of you giving your statements. You understand your prepared remarks will be made part of the record. And keep your statements as brief as possible. We can start with you doctor. Good to have you, and we're glad to have an opportunity to put you back where you are on a permanent basis. Because you've got a big job ahead.

TESTIMONY OF DR. RAYMOND L. ORBACH, NOMINEE TO BE UNDER SECRETARY FOR SCIENCE, DEPARTMENT OF ENERGY

Dr. ORBACH. Thank you, Senator. Mr. Chairman, Senator Bingaman. It's a great honor to have been nominated by the President for this very important new position, and, if confirmed, I look forward to working with this committee to carry out the duties of the Under Secretary for Science and to help Secretary Bodman and Deputy Secretary Clay Sell to carry forward their vision of science as a core mission, an enabler of the Department of Energy.

I also want to thank this committee, and your colleagues in the Congress, for authorizing the position of Under Secretary for Science in the Department of Energy. The creation of this position highlights the important role of science and scientific research at the Department of Energy, and indeed in the American economy. By authorizing this position, Congress, and this committee in particular, has given science an even more important role to play in the development of Department of Energy's priorities and its mission. Not only through the Office of Science, but also through all of the Department programs. There is enormous potential in this visionary change.

The role of science has been recognized by the President, and his American Competitiveness Initiative. The President's initiative demonstrates his commitment to strong and continued U.S. competitiveness through a national effort in basic science research and education. I believe that in creating the position of Under Secretary for Science, this committee and the Congress have pointed to a transformation in the way the Department pursues and achieves its mission, drawing on the formidable powers of science.

It is a great honor to have been nominated by the President for this position. Thank you.

[The prepared statement of Dr. Orbach follows:]

PREPARED STATEMENT OF DR. RAYMOND L. ORBACH, NOMINEE TO BE UNDER SECRETARY FOR SCIENCE, DEPARTMENT OF ENERGY

Mr. Chairman, Senator Bingaman, Members of the Committee.

It is a great honor to have been nominated by the President for this very important new position, and, if confirmed, I look forward to working with this Committee to carry out the duties of the Under Secretary for Science as listed in Title X of the Energy Policy Act of 2005, and to helping Secretary Bodman carry forward his vision of science as a core mission of the Department of Energy.

I also want to thank this Committee, and your colleagues in the Congress, for authorizing the position of Under Secretary for Science in the Department of Energy. The creation of this position highlights the important role of science and scientific research at the Department of Energy, and indeed in the American economy as a whole. By authorizing this position, Congress, and this Committee in particular, has given science an even more important role to play in the development of DOE's priorities and the carrying out of our mission—not only through the Office of Science, but also throughout all of the Department's programs. There is enormous potential in this visionary change.

I welcome the opportunity to broaden and deepen the working relationship between the Department's Office of Science and the Department's applied programs. We already have had many beneficial interactions. The Energy Policy Act of 2005 enables us to transform these relationships, to work much more closely within the Department's basic and applied programs, and especially to assist the Department's programs in reducing risk.

The applied programs in the Department—and here I am speaking of such programs as Energy Efficiency and Renewable Energy (EERE), Nuclear Energy (NE), and Environmental Management (EM)—have difficult responsibilities, and there are technical risks and challenges associated with carrying out their missions. I believe Under Secretary for Science will play an important role in mitigating these risks with scientific research.

To accomplish this objective, we at the Department of Energy will need to fund and perform science that is world-class, science that is at the far frontier of human knowledge, what I call transformational science. Transformational science is science that opens entirely new avenues and methods for solving problems, that gives us revolutionary new tools for mastering the challenges of our world.

This has been appropriately recognized by the President in his American Competitiveness Initiative. The President's initiative demonstrates his commitment to strong and continued U.S. competitiveness through a national effort in basic science research and education. I believe the Under Secretary of Science position, therefore, has been established at a pivotal juncture for this nation, not only to help assist the applied programs, but to help drive transformational science.

The challenges that our nation faces, particularly in the pursuit of energy security and independence, will require such transformational science in the years ahead. DOE's Office of Science, which I have had the privilege of leading for the past four years, has been one of the great sponsors and sources of transformational science over the decades. It is my belief, and my goal if I am confirmed as the Department's Under Secretary for Science, that science in general, and transformational science in particular, will become more central to the way the Department of Energy accomplishes its mission.

There are other critical roles for the Under Secretary for Science as well. From boosting science and math education, to advising the Secretary about the well-being and management of the Department's national laboratories, the Under Secretary for Science can play a pivotal role in the future success of the Department's missions.

In short, I believe that in creating the position of Under Secretary for Science, this Committee, and the Congress, have pointed to a transformation in the way the Department pursues and achieves its mission, drawing on the formidable powers of science. It is a great honor to have been nominated by the President for this position. Thank you.

The CHAIRMAN. Thank you, very much.
Mr. Karsner.

TESTIMONY OF ALEXANDER A. KARSNER, NOMINEE TO BE ASSISTANT SECRETARY FOR ENERGY EFFICIENCY & RENEWABLE ENERGY, DEPARTMENT OF ENERGY

Mr. KARSNER. Thank you. Mr. Chairman, Senator Bingaman, it's a great honor to appear before you today as the President's nominee for the position of Assistant Secretary of Energy for Energy Efficiency and Renewable Energy. I appreciate very much the support of Secretary Bodman and Deputy Secretary Sell. And I am particularly grateful to President Bush for his confidence in me, coming at a time that he has resolutely called upon the Nation to address an addiction to oil and transform the way we power our economy and lead our lives.

My parents, David and Blanche, have been together more than 51 years and they raised four children, born on separate Air Force bases across three continents. They instilled in us an appreciation of service above self. Unlike my grandfather, my brother Fred, my father, and every male Karsner since our family first immigrated, I have not known the privilege or honor of wearing the uniform of

our country. So, the opportunity to serve this Nation at this critical juncture is especially meaningful to my family.

My wife Maria is my partner, my best friend, my soul mate and is a rock of stability for me. Our children, Caroline Hope, who is 3 and Jenny Faith, who is 1, are named for their grandmothers and the timeless aspirations of their values. If confirmed, nothing would be more meaningful to me, Mr. Chairman than to contribute to the great cause of America's energy independence and see all children inherit a healthier, cleaner, and a freer world. Along with my siblings Danielle, Diana, and Fred, I want to thank all of my family for their unending love and support.

I commenced my studies in Political Science and Religious Studies at Rice University more than two decades ago. At that time, if you wanted a job in Houston, Texas then chances were it would be in the energy industry. I became part of a dynamic company developing, financing, owning and operating Michigan's first coal and wood waste co-generation independent powerplant.

As a very young man, I was fortunate to gain experience in coal, biomass, oil and gas projects and exposure to most aspects of project development, management, and finance, including contract negotiation, economic and financial analyses, permitting and construction. As infrastructure opportunities grew and my own experience deepened, I discovered an untapped and unlimited enthusiasm for the creativity and imagination, risks and results of free enterprise.

As the senior development manager at Wartsila and as managing director of Enercorp, I traveled extensively in China, Southeast Asia, the Pacific and the Subcontinent, North Africa, and the Middle East. Working to develop new generation facilities to power these markets unprecedented economic growth. Essential to the task was maximizing the value of international collaboration, and asserting leadership with multi cultural management, recognizing the forces of global competition.

Having survived and succeeded in developing from concept to commercial operations Karachi, Pakistan's first independent power facility, I came also to experience and understand the nature and tactics of our present enemy and the threat posed to the progress of civilized society.

The efforts then were substantially motivated by trying to provided reliable electricity to developing nations, so that people could study, women could pursue literacy, refrigerate vaccines and food, and access even a fraction of the conveniences we often take for granted. The sum of my experiences has led me to resolve that energy efficiency is more than intelligent economics, it is a moral imperative.

Much of Karachi and parts of Sindh were in open insurrection in those days, under martial occupation, with terror attacks occurring almost nightly. We had erratic electric supply, no email, no internet, no cell phones and no assurances of our safety. But, in spite of the enormity of the challenge, or perhaps because of it, I was able to manage a dedicated people of different nationalities and various perspectives to focus on objectives of measurable progress. And I hope that will be useful here.

I learned to guide market forces to reasonable risk and overcome market imperfections and impediments to the free flow of capital, goods, services, and ideas. I am hopeful that if confirmed, this perspective will add value in the Department and the administration.

I believe that success can be defined by enabling commercial frameworks and free enterprise to accelerate the development and deployment of new energy technologies. Mr. Chairman, members of the committee in concluding my remarks I'm drawn back once again to my father's example. He served this government all his life, including nearly 25 years in the armed services. When the Strategic Air Command deployed him for a year away from our family to a distant land amidst a foreign people, I was too young to understand what compelled him to go. But, as we grew older, he made sure that my siblings and I understood the meaning of his service. He said "We owe everything to America, everything, for the right to worship God in peace, without fear of persecution and for the opportunity to pursue our dreams, whatever they may be." But, he would always add "our liberty comes with responsibilities and our opportunities imply an obligation."

I am honored to be before you today and if for the opportunity, if confirmed, to extend my family's legacy of public service, and to take on the great challenges before us and the responsibilities for which I've been nominated. Thank you and I would be pleased to answer any questions.

[The prepared statement of Mr. Karsner follows:]

PREPARED STATEMENT OF ALEXANDER A. KARSNER, NOMINEE TO BE ASSISTANT SECRETARY FOR ENERGY EFFICIENCY & RENEWABLE ENERGY, DEPARTMENT OF ENERGY

Committee on Energy and Natural Resources, United States Senate, March 9, 2006 Mr. Chairman, Senator Bingaman, and members of the Committee, it is a great honor to appear before you today as the President's nominee for the position of Assistant Secretary of Energy for Energy Efficiency and Renewable Energy. I appreciate very much the support of Secretary Bodman and Deputy Secretary Sell and I am particularly grateful to President Bush for his confidence in me, coming at a time that he has resolutely called upon us to address an addiction to oil and transform the way we power our economy and lead our lives.

My parents, David and Blanche, have been together more than 51 years and raised four children, born on separate Air Force bases across three continents. They instilled in us an appreciation of service above self. Unlike my grandfather, my father, my brother, and every male Karsner since our family first immigrated, I have not known the privilege and honor of wearing the uniform of our country. So, the opportunity to serve this nation at a critical juncture is especially meaningful to my family.

My wife Maria is my partner, best friend, soul mate and is a rock of stability for me. Our children, Caroline Hope (who is 3) and Jenny Faith (who is 1), are named for their grandmothers and the timeless aspirations of our values. If confirmed, nothing would be more meaningful to me, than to contribute to the great cause of America's energy independence and see all children inherit a healthier, cleaner, and freer world. Along with my siblings Danielle, Diana, and Fred, I want to thank all of my family for their unending love and support.

I commenced my studies in Political Science and Religious Studies at Rice University more than two decades ago. At that time, if you wanted a job in Houston, then chances were it would be in the energy industry. I became part of a dynamic entrepreneurial company developing, financing, owning and operating Michigan's first coal and wood waste cogeneration independent power plant. As a very young man, I was fortunate to gain experience in coal, biomass, oil and gas projects and exposure to most aspects of project development, project management, and project finance, including contract negotiation, economic and financial analyses, permitting and construction. As infrastructure opportunities grew and my own experience deepened, I discovered an untapped and unlimited enthusiasm for the creativity and imagination, risks and results that free enterprise affords.

An opportunity to take part in the promise of a “new world order” came when the Rotary Foundation awarded me a graduate fellowship and deemed me a “Goodwill Ambassador.” I arrived in China’s booming Pearl River Delta to live, learn and work amongst the Chinese in the autumn of 1991. These were historic and interesting times, arriving only weeks before Chairman Deng Xiaoping’s visit to the region during which he declared China’s new economic openness to the West. During this period, I was drawn to participate intimately in the emergence of Hong Kong’s increasingly democratic processes and elections. My departure came only hours after witnessing the lowering of the Union Jack over Hong Kong harbor and, the columns of the Red Army entering the city for the first time, and what many consider the end of the imperial era. In the interceding years, as the Senior Development Manager and a Project Director for Wartsila Power Development, I traveled extensively and frequently in China, Southeast Asia, the Pacific and the Subcontinent working to develop new generation facilities to power the region’s unprecedented economic growth. Essential to the task was maximizing the value of international collaboration, asserting leadership in an environment of multicultural management, and recognizing the fundamental character of the formidable forces of global competition.

Having survived and succeeded in developing from concept to commercial operations Karachi’s first independent power facility, I came also to experience and understand the nature and tactics of our present enemy and the threat posed to the progress of civilized society.

My efforts were substantially motivated by the promise of introducing reliable electricity to developing nations, thereby providing access to light to read or study, (enabling women to pursue literacy which had been previously forbidden), as well as creating the ability to refrigerate vaccines and food, and to access even a fraction of the conveniences we often take for granted. The sum of my experiences has led me to resolve that energy efficiency is more than intelligent economics; it is a moral imperative.

Much of Karachi and parts of Sindh province were in open insurrection in those days, under martial occupation, with terror attacks occurring almost nightly. We had erratic electric supply, no email, no internet, no cell phones and no assurances of our safety. In spite of the enormity of the challenge—or perhaps because of it—I was able to manage dedicated people of so many nationalities and perspectives to focus on objectives of measurable progress. We synthesized our different points of view to realize a greater vision and achieved with private risk capital what few believed was achievable at all.

Philosophically, I learned to constantly question conventional wisdom about what is in fact possible and to embrace timetables some might consider too distant and speculative. Pragmatically, I learned to guide market forces to reasonable risks and overcome market imperfections and impediments to the free flow of capital, goods, services, people, and ideas. I am hopeful that if confirmed, my perspective will add value in the Department and the Administration and my experience will be applicable to President Bush’s determination that our nation must continue to achieve vital gains towards international competitiveness, a better global environment, and greater energy security.

As I focused my life and founded my business exclusively on the development of new energy technologies, I dedicated myself to contribute to a safer, cleaner, freer and sustainable future for my children, their generation, and the generations to follow. I believe that success will be defined by enabling commercial frameworks and free enterprise to accelerate the development and deployment of new energy technologies to address these challenges head on. If confirmed, I will seek to expand the efforts to more rapidly commercialize and deploy the under-harvested yield of decades of public sector investment in applied research and development.

Mr. Chairman, members of the committee, in concluding my remarks, I am drawn back once again to my father’s example. He served this government all his life, including nearly 25 years in the armed services. When Strategic Air Command deployed him for a year away from our family to a distant land amidst a foreign people, I was too young to understand what compelled him to go. But, as we grew older, he made sure that my siblings and I understood the meaning of his service. He said “We owe everything to America; everything, for the right to worship God in peace, without fear of persecution and for the opportunity to pursue our dreams, whatever they may be.” But, he would always add “our liberty comes with responsibilities and our opportunities imply an obligation.”

I am honored to be before you today and for the opportunity, if confirmed, to extend my family’s legacy of public service, to take on the great challenges before us and fulfill the responsibilities for which I have been nominated.

Thank you and I would be pleased to answer any questions you may have.

The CHAIRMAN. Thank you very much.
Mr. Spurgeon.

TESTIMONY OF DENNIS R. SPURGEON, NOMINEE TO BE ASSISTANT SECRETARY FOR NUCLEAR ENERGY, DEPARTMENT OF ENERGY

Mr. SPURGEON. Mr. Chairman, Senator Bingaman, I am honored to appear before you today as the President's nominee to be Assistant Secretary of Energy for Nuclear Energy. Over the past four decades I have had the opportunity to work on almost every aspect of the nuclear power business, including uranium exploration, uranium mining and milling, uranium enrichment, fuel fabrication, reactor operations, fuel reprocessing and waste solidification.

My first assignment associated with the civilian nuclear industry was in 1969 in the Atomic Energy Commission. Those were exciting times in the nuclear energy field. There was a great deal of optimism concerning the major role that nuclear energy would play in our Nation's energy future. However, the oil embargo of 1973 caused energy prices to spike upward, people used less electricity in response to the higher prices, which in turn caused utilities to delay or cancel new generating stations, many of which were nuclear. Unfortunately, this was followed by double digit interest rates in the late 1970's that disproportionately affected nuclear plants because nuclear plants have high capital costs, offset by low fuel cycle costs.

With the 1979 Three Mile Island reactor accident, the prospects for nuclear energy in the United States hit a low point. It has now been three decades since we have seen a new nuclear reactor ordered in this country. However, the tide is turning, the clouds have parted and we are at the dawn of a nuclear renaissance in America. A plentiful, reliable supply of energy is the cornerstone of sustained economic growth and prosperity. More and more Americans, including many in the environmental community, are recognizing that nuclear power is the only proven technology that can provide abundant supplies of base load electricity reliably and without air pollution or emissions of greenhouse gasses. We now have a new generation of light water reactors that are even safer and simpler to construct than the very safe and economical reactors in use today.

President Bush has proposed a visionary initiative in the Global Nuclear Energy Partnership. This plan, which includes demonstrating the technology necessary to recycle spent fuel in a proliferation resistant manner, has the potential to solidify nuclear energy's current resurgence for decades to come and ensure it is done in a safe and secure manner.

Mr. Chairman, simply put, America needs more nuclear energy and, if confirmed, I will do everything in my power to assist in bringing about the increased use of safe nuclear energy in the United States and elsewhere for the benefit of mankind and the environment in which we live.

The Energy Policy Act of 2005 has provided us with some excellent tools with which to do our jobs. Many of our farsighted utility executives are preparing for new nuclear orders and our reactor

suppliers are preparing some outstanding product offerings. These are once again very exciting times to be in the nuclear energy field.

I am honored that President Bush nominated me for this position at such an historic time, and I am thankful to have the trust of Secretary Bodman as well. If confirmed I will have an opportunity to contribute to a much better energy future for our children and generations to come. I can think of no greater legacy to leave.

Mr. Chairman, that concludes my statement. I would be pleased to answer any questions.

[The prepared statement of Mr. Spurgeon follows:]

PREPARED STATEMENT OF DENNIS SPURGEON, NOMINEE TO BE ASSISTANT SECRETARY FOR NUCLEAR ENERGY, DEPARTMENT OF ENERGY

Mr. Chairman, Senator Bingaman and members of the committee, I am honored to appear before you today as the President's nominee to be Assistant Secretary of Energy for Nuclear Energy. I would like to introduce and recognize my wife of 40 years, Carroll Spurgeon. When we began our lives together under an arch of swords at the Naval Academy chapel we could never have comprehended what an amazing odyssey we were about to begin together. Carroll has been my biggest supporter, and I have tried to be hers. After raising our three children Carroll went back to school, was awarded a degree in design, became a licensed designer and spent 16 years as a contract employee for the CIA. She has had some very interesting experiences.

Also with me today are my sons Dennis and Scott and my daughters-in-law Cherine and Monica. My daughter Kimberly lives in London and could not be here today, but I always have her support.

Over the past four decades I have had the opportunity to work in almost every aspect of the nuclear power business, including uranium exploration, uranium mining and milling, uranium enrichment, fuel fabrication, reactor operations, fuel reprocessing and waste solidification. My first assignment associated with the civilian nuclear industry was in 1969 at the Atomic Energy Commission. Those were exciting times in the nuclear energy field. There was a great deal of optimism concerning the major role that nuclear energy would play in our nation's energy future. However, the oil embargo of 1973 caused energy prices to spike upward, people used less electricity in response to the higher prices, which in turn caused utilities to delay or cancel new generating stations, many of which were nuclear. Unfortunately, this was followed by double digit interest rates in the late 1970's that disproportionately affected nuclear plants because nuclear plants have high capital costs (offset by low fuel cycle costs). With the 1979 Three Mile Island reactor accident, the prospects for nuclear energy in the United States hit a low point. It has now been three decades since we have seen a new nuclear reactor ordered in this country.

However, the tide is turning, the clouds have parted and we are at the dawn of a nuclear renaissance in America. A plentiful, reliable supply of energy is the cornerstone of sustained economic growth and prosperity. More and more Americans, including many in the environmental community, are recognizing that nuclear power is the only proven technology that can provide abundant supplies of base load electricity reliably and without air pollution or emissions of greenhouse gasses. We now have a new generation of light water reactors that are even safer and simpler to construct than the very safe and economical reactors in use today.

President Bush has proposed a visionary initiative in the Global Nuclear Energy Partnership. This plan, which includes demonstrating the technology necessary to recycle spent fuel in a proliferation-resistant manner, has the potential to solidify nuclear energy's current resurgence for decades to come and ensure it is done in a safe and secure manner.

Mr. Chairman, simply put America needs more nuclear energy and, if confirmed, I will do everything in my power to assist in bringing about the increased use of safe nuclear energy in the United States and elsewhere for the benefit of mankind and the environment in which we live. The Energy Policy Act of 2005 has provided us with some excellent tools with which to do our jobs. Many of our farsighted utility executives are preparing for new nuclear orders and our reactor suppliers are preparing some outstanding product offerings. These are once again very exciting times to be in the nuclear energy field. I am honored that President Bush nominated me for this position at such a historic time, and I am thankful to have the trust of Secretary Bodman as well. If confirmed I will have an opportunity to contribute to a much better energy future for our children and generations to come. I can think of no greater legacy to leave.

Mr. Chairman, this concludes my statement. I would be pleased to answer any questions.

Mr. Chairman: Thank you, very much. Now we're going to here from the Interior nominee, David Bernhardt. We're glad to have you here. Sorry you're out numbered by DOE people, but we're glad to have you.

**TESTIMONY OF DAVID LONGLY BERNHARDT, NOMINEE TO BE
SOLICITOR OF THE DEPARTMENT OF THE INTERIOR**

Mr. BERNHARDT. I make it up in weight Senator.

Chairman Domenici, Senator Bingaman, I am honored to appear here today as the President's nominee to be the Solicitor of the Department of the Interior. I ask for your consent to the President's nomination.

My interest in working on the diverse issues affecting the Department of the Interior stems from many personal experiences. I am from Garfield County, Colorado. Located in western Colorado, Garfield County is comprised of small rural communities nestled in the Rocky Mountains. The majority of land in Garfield County is federally owned. Growing up, I went hiking, hunting, skiing, and riding on horseback on those Federal lands.

My personal experiences also add clarity and context to my understanding of the vital role that the Department of the Interior plays in providing enjoyment, education, and inspiration to present and future generations. I still recall the feelings of wonder and amazement I had as a small child walking through the cliff dwellings at Mesa Verde National Park, and climbing into a kiva. The few hours spent at Mesa Verde did more to stimulate a childhood interest in reading than months of effort and persistence by my parents and teachers.

Garfield County's economy was, and remains, closely tied to activities that take place on Federal lands whether they are recreational or related to natural resource development. My hometown of Rifle was once the self proclaimed Oil Shale Capital of the World, and it suffered a dramatic economic downturn during the 1980 energy bust. Changing economic realities and changing Federal priorities impacted both individuals and the community as a whole for several years. Rifle regained control of its destiny, and today a dynamic, vibrant, thriving community exists. I know firsthand that the decisions made at the Department of the Interior can have longstanding and very real social and environmental impacts. I understand the importance of obtaining meaningful input to help ensure informed Federal decisions.

I've had the privilege of working for Secretary Norton for the past 5 years. She is an inspiring leader who understands the law and who is interested in practical solutions that achieve on the ground results. I worked previously with Secretary Norton in the private sector as well. During my tenure at Interior, I've had the opportunity to work on many complex issues affecting each of Interior's diverse bureaus. I have a clear understanding of the conflicting legal and policy issues facing the decision makers within the Department. I've worked as a member of a small team focused on addressing many of our long-standing trust challenges. I've negotiated complex legal settlements and legislative initiatives and

have made recommendations to the Justice Department regarding litigation positions. I've led the coordination of the Department's effort to implement the National Energy Policy Act of 2005. And I've had the responsibility for managing attorneys and other staff in both the Office of Congressional and Legislative Affairs and the Office of the Solicitor.

The primary mission of the Office of the Solicitor is to provide legal support for the goals, objectives, and responsibilities that are given to the Secretary by the President and Congress. Since December 2001, the cadre of talented and dedicated lawyers and staff within the Office of the Solicitor has been disconnected from the internet. The lack of internet access, Senator for more than three hundred attorneys and their support staff impacts the speed of review and the timing and quality of advice that this office provides for all activities conducted within the Department.

In closing, my service over the last 5 years has given me the opportunity to learn some very significant lessons which I will carry with me into the job of Solicitor. If I receive your consent to this nomination and am confirmed, I will approach questions with an open mind. I will actively seek input and listen to varied views and perspectives to help ensure the recommendations I will make and the conclusions I will make are more informed. I will carry out my responsibilities with dedication and integrity. Thank you for your consideration of my nomination. I look forward to your questions.

[The prepared statement of Mr. Bernhardt follows:]

**PREPARED STATEMENT OF DAVID LONGLY BERNHARDT, NOMINEE FOR THE POSITION
OF SOLICITOR OF THE DEPARTMENT OF THE INTERIOR**

Chairman Domenici, Senator Bingaman, and Members of the Committee, I am honored to appear here today as the President's nominee to be the Solicitor of the Department of the Interior. I ask for your consent to the President's nomination.

My interest in working on the diverse issues affecting the Department of the Interior stems from many personal experiences.

I am from Garfield County, Colorado. Located in western Colorado, Garfield County is comprised of small rural communities nestled in the Rocky Mountains. The majority of land in Garfield is federally owned. Growing up, I went hiking, hunting, skiing, and riding on those Federal lands.

My personal experiences added clarity and context to my understanding of the vital role the Department of the Interior plays in providing enjoyment, education, and inspiration to present and future generations. I still recall the feelings of wonder and amazement I had as a small child walking through the cliff dwellings at Mesa Verde and climbing into a kiva. The few hours spent at Mesa Verde did more to stimulate a childhood interest in reading than months of effort by my parents and teachers.

Garfield County's economy was, and remains, closely tied to activities that take place on these Federal lands whether they are recreational or related to natural resource development. My hometown of Rifle, Colorado, once the self-proclaimed "Oil Shale Capital of the World," suffered a dramatic economic downturn during the mid-1980s energy bust. Changing economic realities and changing Federal priorities impacted both individuals and the community as a whole for several years. Rifle regained control of its destiny, and today a dynamic vibrant thriving community exists. I know firsthand that the decisions made at the Department of the Interior can have longstanding and very real social and environmental impacts. I understand the importance of obtaining meaningful input to help ensure informed Federal decisions.

I have had the privilege of working for the past five years with Secretary Norton, an inspiring leader who understands the law and who is interested in practical solutions that achieve on-the-ground results. I had the opportunity to work with Secretary Norton in the private sector, when we both worked at the firm of Brownstein, Hyatt and Farber, P.C. I initially met the Secretary while serving on the staff of a Member of the House of Representatives, where much of my effort was focused on issues that related to the Department of the Interior.

Since coming to the Department, I held several positions within the Office of the Secretary including: Special Assistant to the Secretary, Counselor to the Secretary, Director of Congressional and Legislative Affairs, and Deputy Chief of Staff. I currently serve as the Deputy Solicitor within the Office of the Solicitor.

During my tenure at the Department, I have had an opportunity to work on many complex issues affecting each of Interior's diverse bureaus. I have a clear understanding of the often conflicting legal and policy issues facing the decisionmakers within the Department. I have worked as a member of a small focused team addressing many of our longstanding Indian Trust challenges. I have negotiated complex legal settlements and legislative initiatives and have made recommendations to the Department of Justice regarding litigation positions. I have led the coordination of the Department's effort to implement the National Energy Policy Act of 2005. I have also had the responsibility for managing attorneys and other staff in both the Office of Congressional and Legislative Affairs and the Office of the Solicitor.

The primary mission of the Office of the Solicitor is to provide legal support for the goals, objectives, and responsibilities that are given to the Secretary by the President and Congress. Since December 2001, the cadre of talented and dedicated lawyers and staff within the Office of the Solicitor has been disconnected from the Internet. The lack of Internet access for more than three hundred attorneys and their support staff impacts the speed of review and the timing and quality of advice this office provides for all activities conducted within the Department. The loss of connectivity also significantly hampers employee morale. I recognize these impacts and, if confirmed, will work to find a resolution to this situation.

In closing, my service over the last five years has given me the opportunity to learn some very significant lessons which I will carry with me into the job of Solicitor. If I receive your consent to this nomination and am confirmed, I will approach questions with an open mind. I will actively seek input and listen to varied views and perspectives to help ensure that the recommendations I make, or conclusions I draw, are more informed. Most importantly, I will work to ensure the Secretary and her subordinate officers receive unbiased and intellectually honest advice regarding their options under the law.

If I am confirmed, I will carry out my responsibilities with dedication and integrity. I will not lose sight of the fact that the decisions we make at the Department of the Interior have longstanding impacts on our Federal lands, the communities that surround them, and our county as a whole.

Thank you, Mr. Chairman, Senator Bingaman, and Members of the Committee for your consideration of the President's nomination. I ask for your consent, and I am pleased to answer your questions.

The CHAIRMAN. Thank you, very much.

Senator Bingaman.

Senator BINGAMAN. Thank you, very much Mr. Chairman. Let me start with a question to Mr. Karsner. There's been a major concern here in the Congress and elsewhere about the failure of the Department of Energy to move ahead and adopt, or issue the necessary standards for a lot of the appliances that we have legislated requirements for. But, as I understand it, a whole group of Attorney's General have sued the Department; essentially trying to insist that you get on with that. Can you tell us your plan to get this problem solved, and how quickly you expect to get it done.

Mr. KARSNER. Thank you, sir. It is my understanding that a schedule has been published for the appliance standards that had been lacking for sometime. And that that schedule effectively provides a road map and a critical path for implementing those standards. Which as you point out are long overdue. I would rate that, of course amongst the highest priorities if I were to be confirmed. To make sure that that critical path is being followed. And to the extent that—I had not been privy to the making of that plan. So, I would intend to also review it, and to see if there are any gaps in it that could be shrunk or accelerated.

Senator BINGAMAN. I wish you would look at it, as I understand it, it's a 5-year plan. Obviously, the administration you're becoming

part of here is not going to be there for 5 years. And we don't know who the new administration will be. But, if there were a way that you could have a plan to get these things done while you're on the job, that would be great. I'm concerned—we're getting toward the end of an administration here. At least we're nearly 3 years away still, but setting goals that take us into the next administration, I think make them less likely that we'll stick with these schedules. So, I would urge you to reevaluate that if you would.

I wanted to ask Mr. Bernhardt if he would—we had a couple years ago—you were then the Director of Office of Congressional Legislative Affairs. As I understand it, your view then was that requests from members of Congress, rather than from committee chairs, were to be handled by the Department of the Interior under the Freedom of Information Act. Is that still your view?

Mr. BERNHARDT. Senator, my view is that the Department of the Interior needs to provide full disclosure to members of Congress, subject to the Department of Justice's guidelines. In 1998, the Chief of Staff for the Secretary of the Interior promulgated guidance for the Department and stated in that guidance that we were to treat requests from individual members under FOIA. Since that time, I've reviewed the Department of Justice's policies and I think that the 1998 guidance misses a number of caveats that were contained within the Department of Justice guidance. And I think that as we move forward with the disclosure of documents for members requests, I would like to first consult with your staff as we go forward. But, also, the Department itself needs to carefully weigh every request and insure we are meeting the needs of Congress to ensure harmonious relationships with you and this committee.

Senator BINGAMAN. Okay. Let me ask about this issue of the so called impairment standard. As I understand it there's been controversy over the Department's proposed revision of the National Park Service Management Policies. A lot of that controversy has related to this so called impairment standard, which interprets the management mandate in the National Park Service Organic Act. That Act directs the National Parks "to conserve the scenery and natural and historic objects, and the wildlife therein. And to provide for the enjoyment of the same in such manner, and by such means as will leave them unimpaired for the enjoyment of future generations." Then in the 2001 Management Policies there's a statement there—this is another quote, "when there's a conflict between conserving resources and values, and providing for enjoyment of them, conservation is to be predominant." Do you agree with that interpretation of the 2001 Management Policies and can you tell us how you would interpret the—this Organic Act as regards to this issue?

Mr. BERNHARDT. Well Senator, your statement about the Organic Act is absolutely correct. That's exactly what the standard is. The duty of the Park Service is to protect the parks. And there has been an ongoing discussion on some management policies. I've not been involved in that, but I know that a draft went out, and we've received a whole host of comments. The Park Service is working through those comments now and whatever policies they come up with at the end of the day will need to comply with the standard that you laid out in the Act, sir.

Senator BINGAMAN. Let me ask about this—my time's up Mr. Chairman. Go head.

Mr. Chairman: No, proceed.

Senator BINGAMAN. I wanted to ask you about the Park Service's proposed new authority for its employees to solicit donations to fund the Park Service activities. This proposal was inconsistent with the guidelines issued by the Solicitor previously, as I understand it. I would just ask if you have approved of the Park Service proposal, or the new Departmental Solicitation Guidelines; is this something you've been involved in, have you made a judgment on that? Have you signed any opinion justifying the new interpretation of the relevant law?

Mr. BERNHARDT. Senator, I have not been intimately involved with that, and I haven't issued an opinion in regards to that. But, I do have an understanding. I don't think that the memos or the opinion that Solicitor Leshy issued and the current interpretation conflict. Solicitor Leshy's memo, if you look at it, makes the argument that there's not explicit authority to solicit donations. Since 2001 the Office of Legal Counsel has opined on a very similar statute. And his conclusion was, even though the authority wasn't explicit, it was implied. And I think if Solicitor Leshy had had the knowledge of that legal opinion, that might of informed his decision making differently, Senator.

Senator BINGAMAN. Let me ask about one other issue. This is a subject called RS 2477 claims. I understand that following the 10th Circuit Court of Appeals decision last year, the Department is developing a process to look into the validity of certain claimed RS 2477 rights of way in Utah. Is that correct?

Mr. BERNHARDT. Senator, RS 2477 has been one of the most contentious land use issues in the West. A recent 10th Circuit Court of Appeals case gives us some additional clarity on that issue. The Department is reviewing the 10th Circuit decision, and is determining how best to go forward and implement our duties.

Senator BINGAMAN. There was a section in the 1997 Interior Appropriations Act that included language placing a moratorium on the ability of the Department of the Interior or any other agency to develop a final rule or regulation pertaining to recognition, management, or validity of RS 2477 rights of way, unless expressly authorized by subsequent Act of Congress. This language has been interpreted by the Government Accountability Office to be permanent law. Do you agree with that?

Mr. BERNHARDT. That is the GAO's interpretation, Senator.

Senator BINGAMAN. But is that your interpretation?

Mr. BERNHARDT. I haven't opined or researched the question. But, I'd be happy to do that and get back to you on it.

Senator BINGAMAN. Okay. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. First of all, nominees I want to apologize for not being here at the offset. The Budget Committee is also meeting, and I had to be there for an amendment regarding ANWR. And it's pretty hard to be both places. So, I couldn't quite get them to accommodate to this hearing. So, I thank Senator Allen, and thank you, and in particular Senator Bingaman.

Let me say to all of you, first I am very impressed with your statements, your background, and most of all your genuine enthu-

siasm for wanting to do a job. And I can't help but say that the recruitment in getting you to take this job has been marvelous. I never expected that Clay Sell to be so effective in getting such wonderful people to be helpful. I think the fact that we have a great Secretary, and a great—Clay Sell as his assistant probably has something to do with it. I gather that—leaving you aside for a minute Mr. Interior, I gather that there's great enthusiasm on the part of the three of you to get on with seeing what we can do with the energy dilemma of our country.

I'm going to start with you, Dr. Orbach. You have a job that, a few years ago was kind of a mild, little job over there. It seems now that it's growing. And I want to make sure that you feel that you have sufficient professional support to carry out the rather broad new science initiative activities that you are going to undertake. Do you know of an answer to that question yet, or will you have to be telling us in the—down the line how you feel about it?

Dr. ORBACH. Mr. Chairman, first of all I have to thank you for your leadership that created this opportunity. I have enjoyed my relationship with Secretary Bodman, and Deputy Secretary Sell enormously. And I feel I have their full backing for the responsibilities that are contained in the Energy Policy Act. So, I think I can say that I'm looking forward. It is a wonderful opportunity. And I believe I have their full support to carry out this mission.

The CHAIRMAN. I'm sorry, please proceed. Would you repeat what you just said.

Dr. ORBACH. Yes, certainly. I said, I believe I have their full support to carry out this mission.

The CHAIRMAN. I did want to say, you kind of particularly thanked me regarding the office. I wanted to make it clear in the record that it was Senator Bingaman's idea that you become an Undersecretary in that job. And I think that was a good decision. Not that titles make a difference, but it is a very important position.

I want to ask the second question, it has to do with the Science Education Enhancement Fund. The Energy Policy Act created this Science Education Enhancement Fund. I'm not sure you're even aware of that, are you?

Dr. ORBACH. Yes, I am.

The CHAIRMAN. All right. It consists of three tenths of a percent set aside, made available for research, development and demonstration. We understand that in fiscal year 2006, these funds are remaining within each office, rather than being combined into a comprehensive fund. I'm concerned, and I don't know what your feelings are, that if you fragment it that way it probably will not achieve the benefits that it might if it were put together. And then determine where it should go. Would you follow the intent of that, and how were you going to integrate—how you were going to implement that?

Dr. ORBACH. Well, Mr. Chairman we are currently in the process of doing a cross cut across both the Department, and also the laboratories in their educational programs. And one of the duties that the Under Secretary for Science will have, is precisely that coordination. And so, if I'm confirmed I will do as you suggest. Namely

to coordinate the education programs within the Department of Energy.

The CHAIRMAN. I have some additional questions, including a couple on the Genome Program, which you have. Which people don't even know are in your Department. But, it's a very big program, and I want to ask something specific. But, I'll do that for the record.

Dr. ORBACH. Thank you.

The CHAIRMAN. Let me move over a minute now to Mr. Karsner. First of all let me thank you for your opening statement. I really appreciate the depth of your expression of commitment and why you took this job. And I truly hope that bureaucratic difficulties you run into, which will be significant. Not because they're of your making or Secretary Sell's making, they're just there. But I hope you will bring to that the ideas you expressed here today. And that was to cut through that and get some things done.

Is it your opinion that as we look at America's continued dependance, that efficiency and conservation are as important as production? They are pillars, co-pillars, in terms of us reducing our dependance?

Mr. KARSNER. Thank you for the compliment, first of all, Mr. Chairman.

The CHAIRMAN. You're welcome.

Dr. KARSNER. In balancing efficiency with production, I think it's easy to say it is as important. In fact, I think there's a very strong argument to say it's more important in that it may be easier to achieve efficiency gains in the near term. And should be at least as much a priority as new means of production within—when balancing against renewable energy.

The CHAIRMAN. And that's what you will seek—that's the impetus which will be at your back, pushing you as you try to get this done. That it is that important, is that correct?

Dr. KARSNER. That is absolutely correct, sir.

The CHAIRMAN. Again, we have some specifics we'll ask you with reference to the various laws you'll implement, but there are only a few. And I'll give them to you. Answer them quickly, so we can confirm you as soon as possible—report you out as soon as possible.

Let me then move now to you, Mr. Spurgeon. Again, I want to use the same approach. I'm very—somewhat almost amazed that you will take this job, and I'm pleased. I heard you talk about your history way back—Joint Atomic Energy Commission, and I was wondering how old you were when you first got involved in nuclear activities?

Mr. SPURGEON. Well, that was 1969, so I would have been 26 years old. In a civilian capacity, I was involved actually a little before that in a military capacity.

The CHAIRMAN. I told Senator Bingaman you looked so young, you must have been a teenager when you got involved in it. I was off by 10 years.

Mr. SPURGEON. Well thank you, sir.

The CHAIRMAN. Could I just say to you that while everybody is saying there seems to be a renaissance occurring in nuclear power—civilian nuclear power. And I'm very proud, I've have a little bit to do with that. I think the role you are taking will deter-

mine whether it works or not. There is no question that what happens to the waste, what our plan for that I should say is. Can we get a plan in place that's creditable even if it takes an awful long time to implement? Is absolutely imperative. The longer it takes, the longer that renaissance—or the closer that renaissance will come to wilting in my opinion. So, I hope you know you took a big job on.

Also, I would suggest to you that the President's program for recycling, international program, requires real coordination. Not only here in America, but in the world. And I'm sure the Secretary's fully aware of it, and I'm sure you are. Can I ask you, are you a—have you studied and looked at the approach that is being recommended for recycling, with the new technology that will minimize proliferation of plutonium? Do you follow it, and do you advocate it, and do you think it will work?

Mr. SPURGEON. Well, I have not seen the details of the program from a Department of Energy standpoint. I've seen what's been put out in the public record. The testimony that's been given concerning it. And the material that's published on the Department of Energy website. So, I have a general familiarity with it. Some of the original work in these alternative processing technologies, were actually initiated by my group back in 1977. So, for me it's a little bit of a time warp. I'm going back and looking at some of the frustration of some of the things that were begun back then to find ways to process material without separating out the plutonium. So, do I support it? Absolutely. Do I think it's a great initiative? Absolutely. Is there a whole lot of heavy lifting to do? Absolutely.

The CHAIRMAN. Mr. Solicitor let me just ask, or tell you that you made a comment about the internet. And obviously the problem goes well beyond this hearing. But, might I ask is there anything that we can do that might alleviate this, so that I know you're working at trying to get it worked out with the court. But that seems to leave you in a terrific impediment for a long time now. Is there anything you have to recommend or suggest to us that we might do to be helpful?

Mr. BERNHARDT. Well Senator, the impact of the internet shutdown is tremendous. And we, you know, are going through the litigation pathway and that's going to take a long time. It's already taken 4 years. Now Senators Dorgan and McCain are working on some legislation regarding the underlying issue of *Cobell v. Norton*. But, I'd be happy to work with your staff and see if there are other options out there. I think awareness is the first step. And then we need to look at whether it's something that Congress ought to examine.

The CHAIRMAN. Well, not knowing any more than I know about it, just being confronted with the statement you have made here. And what that must mean, permits me to—causes me to say I'm interested in your beginning to exchange with our staff what this is all about. I mean a judge has plenty of power, and he can do what he can within a case. But it would seem to me that we have to look at the problem that is being generated well beyond the issues before that court. And that's just a Senator up here not knowing what judge is. Maybe he'll come down here and get me, who knows. I would relish talking with him in any event. But, we

wouldn't mind an exchange with our staff, if the Secretary thinks that's legitimate. We'd like that to happen.

Mr. BERNHARDT. I think she would appreciate that opportunity greatly, Senator. And I know we would as well.

The CHAIRMAN. And my questions that I'm submitting to you have to do with some Indian water rights issues. Some issues with reference to reimbursement of Indian legal fees. And also some issues with reference to settlement of Indian water claims. You'll have to answer those before you get confirmed. I don't suggest how you answer them, but answer them nonetheless.

If Senators have any additional questions they need to submit them for the record by 5 o'clock tonight. And how long do we want to give them to answer their questions? All right. If you want—if you want us to send you out of here next Wednesday to the Senate floor, you have to answer these questions by Monday night. Okay? If you'll do that we'll appreciate it. And we thank you very much, and we stand in adjournment.

[Whereupon, at 11 a.m., the hearing was adjourned]

[The following letter was received for the record:]

AMERICAN CHEMICAL SOCIETY,
Washington, DC, March 8, 2006.

Hon. PETE V. DOMENICI,
Chairman, Energy and Natural Resources Committee, U.S. Senate, Washington, DC.
Hon. JEFF BINGAMAN,
Ranking Member, Energy and Natural Resources Committee, U.S. Senate, Washington, DC.

DEAR CHAIRMAN DOMENICI AND RANKING MEMBER BINGAMAN: On behalf of the 159,000 members of the American Chemical Society, it is with great pleasure I write to endorse President George W. Bush's Nomination of Dr. Raymond L. Orbach to be Undersecretary of Science at the Department of Energy.

For three years, Dr. Orbach served with distinction as Director of the Department of Energy's Office of Science. Dr. Orbach managed an approximately \$3.5 billion budget, including 10 non-weapon laboratories, representing the finest suite of scientific facilities and instruments in the world, used annually by over 19,000 researchers. During his tenure, he oversaw a plan for future scientific facilities development and a strategic plan. Furthermore, in 2004, in conjunction with the Secretary of Energy, Dr. Orbach initiated a restructuring of the Office of Science to improve both its efficiency in human resource management and improve communications and scientific discovery.

Prior to joining the Office of Science, Dr. Orbach was Chancellor of the University Of California, Riverside. Under his leadership, the university doubled in size and achieved national and international accolades, leading the University of California system in educational opportunities. Dr. Orbach remained an active teacher while at UC-Riverside, working with postdoctoral, graduate, and undergraduate students at his laboratory as Distinguished Professor of Physics. He has participated in over 240 published scientific articles and received numerous honors around the world, including fellowships from the Alfred P. Sloan Foundation, National Science Foundation, and John Simon Guggenheim Memorial Foundation.

As a major part of the President's American Competitiveness Initiative, the Office of Science will play a central role in ensuring the continued preeminence of America's scientific and technological community in the global marketplace. ACS feels Dr. Orbach's appointment to the position of Undersecretary of Science is crucial to the success of ACI and the future growth of the Office of Science, and we enthusiastically endorse his confirmation without delay.

Sincerely,

E. ANN NALLEY,
President.

APPENDIX

RESPONSES TO ADDITIONAL QUESTIONS

RESPONSES OF DR. ORBACH TO QUESTIONS FROM SENATOR DOMENICI PACE-ENERGY INITIATIVE

Question 1. We just reported yesterday out of Committee the PACE-Energy Act that creates many new authorities for the Department of Energy to enhance science and math programs. Some of these initiatives are changes to existing programs, and most of the implementation of the PACE-Energy Act will be under your purview as Undersecretary of Science.

Do you think that you currently have sufficient professional and support staff to implement this Act, and if not, what is your recommendation for addressing that issue?

Answer. If I am confirmed as Undersecretary for Science, I would undertake an assessment of the overall personnel needs for the Office of the Undersecretary. I would also have my staff assess what personnel would be required to comply with the provisions of PACE, if passed, as well as the provisions of any other laws that pertain to my potential duties as Undersecretary of Science. All of these assessments will be performed under my direction and in consultation with the Secretary and the Deputy Secretary of Energy, who have indicated their full support.

SCIENCE EDUCATION ENHANCEMENT FUND

Question 1. The Energy Policy Act of 2005 created the Science Education Enhancement Fund, consisting of a 0.3 percent set-aside of the amount made available to the Department for research, development, and demonstration. We understand that for fiscal year 2006 these funds are remaining within each office, rather than being combined into a comprehensive fund. I am concerned that this fragmented approach will not produce the greatest benefits to science education programs.

Will you follow the intent of this provision and create a comprehensive fund for science education?

Answer. We are preparing a crosscut of our education efforts from both headquarters and through our national laboratories. Our sense today is that we are already in line with, or exceed, the spending amounts of the bill. If confirmed as Under Secretary, I would perform an assessment of the needs of the DOE education effort and work to ensure the Department's approach to this critical problem is coordinated and comprehensive.

Question 2. How will you integrate this with the authorizations and directives in the PACE-Energy Act?

Answer. If confirmed as Under Secretary, I would assess the situation with respect to the authorizations and directives in the PACE-Energy Act, should it pass, and I would ensure that the Department's program is well coordinated and effective.

DEPARTMENT'S TWENTY YEAR FACILITY PRIORITIES

Question 1. In 2003, during your tenure as Director, the Office of Science released a plan entitled, "Facilities for the Future of Science: A Twenty Year Outlook." The Plan includes a priority list of 28 major new facilities and facility upgrades.

Have the Department's priorities among these major proposed facilities shifted since the release of the report? If so, how have they changed?

Answer. The Department set its priorities for scientific facilities in the near-, mid- and long-term based on the importance of the science they could perform and their readiness for construction. These were laid out in *Facilities for the Future, A Twenty-year Outlook*. In that document we stated that, "The Twenty Year Outlook represents a snapshot—the DOE Office of Science's best guess today at how the future of science and the need for scientific facilities will unfold over the next two decades.

We know, however, that science changes. Discoveries will alter the course of research and so the facilities needed in the future. For this reason, the *Outlook* should be assessed periodically in light of the evolving state of science and technology.” Reviews of the Department’s priorities are ongoing and have resulted, for example, in the movement of the upgrade of the National Synchrotron Light Source (NSLS II) from the far-term to the near-term, based on our new assessment of its readiness for construction.

NAS REPORT ON GENOMICS FACILITIES

Question 1. A report released last month by the National Academy of Sciences recommends significant changes to the Department’s planned GTL:Genomics facilities. Since a solicitation for the first of these facilities is already published, I am concerned that a major reorganization of this effort will delay construction of the first facility by a year or more.

Has the Department decided whether to alter its plans for the GTL:Genomics facilities based on the Academy report’s recommendations?

Answer. The Office of Science is carefully reviewing the recommendations of a major report on its Genomics: GTL program issued in late February by a distinguished committee empanelled by the National Academies of Science. The report provided a strong overall endorsement of the Genomics: GTL program—and its research mission of systems biology for bioenergy, carbon sequestration, and environmental remediation—and argued the program should have a “high priority” both for DOE and the nation. At the same time, the report took issue with the GTL program’s current plans for four GTL facilities, to be built in sequence, for (1) protein production, (2) molecular imaging, (3) proteome analysis, and (4) systems biology. The report argued instead for a small number of “vertically integrated” facilities each of which would combine in a single “institute” all the functions anticipated for GTL facilities 1 through 4 under the program’s current plan. They proposed each institute be focused on a particular application (e.g., bioenergy, carbon sequestration, environmental remediation). The report argued that such an institutional arrangement would produce more mission-focused and compelling science and was more likely to yield results relevant to the Department’s energy mission at an earlier date. While a request for proposals has already been issued on grants.gov for GTL Facility 1 under the current plan, the Office has found the NAS committee’s recommendations sufficiently compelling from the standpoint of scientific methodology, science management, and mission focus that it is engaged in a zero-based re-evaluation of the GTL program’s current facilities approach and its request for proposals for GTL Facility 1, with a decision on the path forward expected soon.

Question 2. If so, do you believe the current solicitation for the first of these facilities can accommodate the changes you may make to the program?

Answer. The solicitation closes April 11. Once we have completed our review, we will, if necessary, make any needed changes to the solicitation and notify possible interested parties as well as post any new guidance or due dates.

RESPONSES OF DR. ORBACH TO QUESTIONS FROM SENATOR MURKOWSKI

FUEL CELLS FOR RURAL APPLICATIONS

Question 1. The Department in the past has been supporting research into the possibility of fuel cells being designed for use in rural, cold-climate areas like Alaska to convert human waste and garbage (methane) into electrical power for home use. What is your level of interest in continuing or expanding such research, given the Department’s budgetary limitations? Alaska’s rural villages face extremely high diesel-generated electricity costs—currently nearly \$1 per kilowatt in some areas—and face real waste disposal problems. Such research offered the promise of solving both issues if cost for small-scale converter units could be reduced. Any thought on this scientific merit of this type of research being funded by the Department in the future?

Answer. The primary support for fuel cell research in the Department is within the Office of Energy Efficiency and Renewable Energy (EERE). Current research and development (R&D) activities are aimed at reducing fuel cell system cost and size and improving the performance and durability of fuel cell systems for transportation, small stationary, and portable applications. Most of this research focuses on advancing polymer electrolyte membrane (PEM) fuel cell systems, with emphasis in areas such as fuel processing (reforming) technologies, improved catalyst and membrane designs, and improved air, thermal, and water management systems. The President’s Hydrogen Fuel Initiative has emphasized fuel cell systems for transportation and both EERE and the Office of Science are engaged in this work; however,

the Department is well aware of the importance of stationary fuel cells for rural areas, especially areas that are not served by the grid, which tend also to experience extreme climates.

If confirmed, I will work closely with the Office of Energy Efficiency and Renewable Energy on all of its fuel cell research, and would be happy to discuss this with you after I have reviewed the status of stationary fuel cells.

DC CURRENT TECHNOLOGY FOR RURAL COMMUNITIES

Question 2. Concerning electricity, in rural Alaska, it is extremely expensive to run AC power to small, geographically isolated communities. There is research underway to modernize power converters to use less capital expensive direct current to get power to such villages. Would you have any willingness to consider making Department resources available for research or to perfect or test new DC current technology to make it more available for rural communities?

Answer. The primary support for distributed energy and the electric grid is within the Office of Energy Efficiency and Renewable Energy (EERE) and the Office of Electricity Delivery and Energy Reliability (OE). The "DC Microgrids" activity supports work to consider powering neighborhoods entirely on direct current (DC). A high-voltage DC line would interface with the rest of the grid through high-tech DC-to-AC converters. DC systems are less vulnerable to power quality issues, they also allow distributed generation equipment to be connected directly with the microgrid without using DC-to-AC converters at the power source. The converter technology needed to interface these DC microgrids with the AC power grid should become cost-effective soon. A future possibility is to use a loop of high-temperature superconducting wire to carry the DC current. This power loop would isolate customers from electrical system disturbances and provide superior power quality. The Office of Electricity Delivery and Energy Reliability and the Office of Science are supporting activities in the area of superconductivity.

RESPONSES OF DR. ORBACH TO QUESTIONS FROM SENATOR BINGAMAN

PACE BILL

Question 1. The Committee approved S. 2197, the Protecting America's Competitive Edge Act-Energy, on March 8. If confirmed, will you and your staff be willing to provide the Committee with timely and open technical advice on questions on the bill that we might have as it moves through the legislative process?

Answer. If confirmed as Undersecretary for Science, I commit to answering the Committee's requests for technical information on the PACE-Energy Bill on a timely basis, to the best of my ability.

Question 2. The PACE bill contains a section authorizing a graduate fellowship program that will eventually fund a pool of up to 1,000 Ph.D. students in the mission areas of the Department. If fully funded, this program will affect up to 20 percent of the Ph.D.s awarded in the physical sciences. Do you believe that the Department can effectively administer such a program?

Answer. The Administration is the process of evaluating the provisions in S. 2197, the Protecting America's Competitive Edge through Energy Act of 2006 (PACE Act). The Office of Science and other DOE offices have a long history in grants management, administering fellowship programs, and peer review of such programs. Our national laboratories also have extensive related experience and currently host thousands of graduate students doing research at their facilities through both grants and contracts with colleges and universities and through direct scholarship programs of their own.

TRANSLATIONAL SCIENCE

Question 3. How can the applied energy programs benefit more directly from the long-term and high-risk research carried out in the Office of Science? What do you mean by "translational" science?

Answer. In my written statement for this hearing, I referred to "transformational" science, which produces discoveries that fundamentally change the way we think and creates totally revolutionary technologies that leapfrog existing ways of doing business. "Translational" science is an overarching term encompassing the steps that must be taken to move or "translate" scientific knowledge from the laboratory bench to its ultimate applications. It is very important to have strong interactions between the technology offices and the Office of Science (SC) in planning major research focus areas. These activities should engage all levels of management and involve the scientific and technology communities. Major new focus areas for the Department include nanotechnology, the hydrogen economy, solar energy utilization,

and advanced nuclear energy systems. In each case, SC and the DOE technology offices have collaborated on planning and execution to ensure that there is excellent and continuous information flow between basic and applied research. Goals are to establish programs within SC that not only provide the scientific foundations for new and improved technologies but also look to the future to transformational science breakthroughs.

SC AND NNSA LABORATORIES

Question 4. A key mission of the NNSA laboratories is to ensure that our nuclear stockpile is safe and reliable. The NNSA relies on the laboratories' science and engineering campaigns to push the leading edge of weapons physics. How will you ensure that the NNSA laboratories take part in the Office of Science research programs so that their science and engineering campaigns remain at the cutting edge?

Answer. Although the Office of Science funding to the NNSA laboratories is a small part of their overall budgets, it is an extremely important part. Funding comes from many of the programs in the Office of Science and helps to support world-class work in condensed matter and materials sciences, chemistry, heavy-element physics and chemistry, biology, modeling and computing, and much more. Several of the Office of Science user facilities reside at NNSA laboratories including the new Center for Integrated Nanotechnologies, which is due to start initial operations this year. Siting Office of Science research at the NNSA laboratories benefits both organizations. It provides the opportunity for the Office of Science to take advantage of the unique facilities and infrastructure at the NNSA laboratories and it provides the opportunity for the NNSA laboratories to attract and retain staff in some of the Nation's most outstanding basic research programs. This synergy ensures that NNSA laboratories will continue to play an important role in Office of Science research programs.

NEXT GENERATION SCIENCE FACILITIES

Question 5. I am concerned about our national leadership in building the next generation of high energy physics machines such as the International Linear Collider or Rare Isotope Accelerator. Knowing that such efforts must be international in scope due to costs, what will you do to ensure the United States builds the next generation of these machines?

Answer. In our planning in the Office of Science, reflected in the President's FY 2007 Budget Request and in our five-year budget recently submitted to Congress, I have given high priority to maintaining U.S. leadership in high energy physics and nuclear physics. I have a strong personal commitment to this goal.

In the FY 2007 Budget Request, funds for R&D for the International Linear Collider (ILC) double over the FY 2006 appropriation to \$60 million. In our five-year budget, the core budget of our High Energy Physics (HEP) program rises to accommodate increased R&D spending for ILC in the out-years. In 2005, the Department of Energy formally expressed interest in the possibility of hosting the ILC at Fermilab. We have made major strides in achieving new levels of international cooperation on science—including substantial cost-sharing—during our multilateral negotiations on the ITER project, and we are ready to apply these well-learned lessons to our efforts on the ILC. I am also conscious that a project of the ILC's magnitude and costs will require strong support from Congress if it is to be realized, and there are a number of major milestones in the administration's own decision-making process that must be passed before we can move beyond the R&D stage. I look forward to working with the Chairman and with Congress to ensure that the United States takes the steps necessary to maintain leadership in this critical scientific field.

Even with the doubling of funding for basic research in the physical sciences over the next ten years announced by the President in his State of the Union address, we are compelled to balance our commitments to specific programs in light of the Nation's priorities.

The Rare Isotope Accelerator (RIA) as originally envisioned would be an extremely capable facility but with an estimated cost of \$1.1 billion, and it would not be a truly international project like the ILC. I believe we can maintain leadership in nuclear physics via an alternate path with a somewhat scaled-down, but still world-class, rare isotope facility.

We are exploring the possibility of starting design and construction on a more limited reaccelerated exotic beam facility around the end of this decade. In the near-term, funding would be provided to develop research capabilities at both domestic and foreign facilities so that the U.S. research community is fully engaged and in the forefront of nuclear structure and astrophysics studies and prepared to fully uti-

lize the U.S. exotic beam facility when it would come into operation. Moving forward, DOE will solicit guidance from the National Academy, the Nuclear Science Advisory Committee, and the scientific community. We believe this path forward is the optimal one, given the costs and the Nation's priorities.

LABORATORY DIRECTED RESEARCH AND DEVELOPMENT

Question 6. How will you manage the Laboratory Directed Research and Development Program and ensure that the Congress will support this important program in the long-term?

Answer. The Laboratory Directed Research and Development (LDRD) program will continue to be effectively managed by the Department through LDRD policies and procedures that provide a strong oversight role for the Department while supporting the laboratories' needs to pursue innovative projects. The Department continually reviews its policies and procedures to ensure they provide the necessary requirements for effective DOE management and the framework to allow for cutting-edge research and development at the laboratories. DOE also monitors its policies and procedures to ensure compliance with any Congressional direction related to the LDRD program. Some of the key requirements of the current LDRD policies and procedures include: DOE review and approval of an annual LDRD program plan and maximum LDRD funding level for each laboratory; DOE concurrence on each proposed LDRD project prior to work being started; and an annual LDRD report provided by each laboratory.

While Congress had several concerns in the past about different aspects of the LDRD program, it has also recognized the value of the LDRD program and the benefits of the research to DOE and the Nation. The Department is committed to work with Congress as new issues or concerns arise regarding the LDRD program to ensure effective stewardship of the taxpayers' dollars.

RESEARCH AND DEVELOPMENT PORTFOLIO

Question 7. Under Secretary Moniz oversaw the development of a series of reports in 1999 laying out an integrated DOE research and development portfolio. A similar report was called for in section 994 of the Energy Policy Act of 2005. While the new report is not due until August 8, 2006, its preparation will require a significant effort, comparable to that for the 1999 reports. If confirmed, will you take the lead for this analysis and ensure it is carried out in a timely manner?

Answer. If confirmed as Under Secretary I will co-lead this effort with the Under Secretary for Energy and will ensure that the report is delivered to Congress in a timely manner. The Department of Energy has engaged in a very detailed planning and analysis process since the passage of the Energy Policy Act to meet the requirements of section 994 and other key provisions of the Act. This process has four major foci: a group of outside experts are reviewing the DOE R&D portfolio using a structured process; an internal group of DOE analysts is developing a methodology to assess the DOE R&D portfolio in an integrated manner; the Department is preparing a new Strategic Plan for public review in the Summer of 2006 that will emphasize the interrelationships between DOE's basic and applied research programs; and DOE's FY 2008 budget review process is being structured in a way to incorporate the previously discussed three elements to ensure that the goals and strategies of the Energy Policy Act, including section 994, are implemented in a timely manner.

RESPONSE OF DR. ORBACH TO QUESTION FROM SENATOR AKAKA

SCIENCE AND MATH EDUCATION

Question 1. I am pleased to see that in your testimony you have indicated that one of the crucial roles for your position is to boost science and math education. Given that we are losing our scientific and technological advantages to India, China, and other countries, what measures are you going to take to encourage our youth to enter the fields of math and science?

Answer. If confirmed as Under Secretary, I would take this as a significant mission of my office. The Office of Science's Workforce Development for Teachers and Scientists program has developed a grade-school to grad-school plan for support of career enhancements in science and engineering. The first of these efforts are the Middle School and High School Science Bowls. These events have about 17,000 students participating in various academic, scientific, and engineering events and competitions that culminate in national events here in Washington with participants from all around the nation. These events are rewarding and exciting for the many students involved.

Our national laboratories have numerous programs to support regional school science and math activities. Most of these activities are organized out of the national laboratory education offices. As a few examples, there are national laboratory workshops for science teachers, very popular "Science Saturday" lectures for local high school and middle school students, and an extensive array of mentor-intensive research internships for high school through graduate school students. The laboratories have also prepared some wonderful web-based teaching materials for elementary and secondary school students and teachers. The President's FY 2007 budget request triples the number of teachers in this program to a total of 300.

Possibly the most effective approach we are using is to bring teachers of science and math to our labs for extended summer research experiences where the teachers are transformed from teachers of science into "teacher-scientists." These teachers through their connections to and support from the national laboratory scientific communities serve as both leaders in their schools for science and math and also as inspirations to their students.

RESPONSE OF DR. ORBACH TO QUESTION FROM SENATOR CANTWELL

FUNDING REQUEST FOR FY 2007 FOR THE CAPABILITY REPLACEMENT LABORATORY (PHYSICAL SCIENCES FACILITY) FOR THE PACIFIC NORTHWEST NATIONAL LABORATORY (PNNL)

Question 1. Dr. Orbach, I understand that the Department of Energy's FY07 budget has no funding in the Office of Science for continued construction of the 300 Area replacement laboratories. I also understand that the recent decision regarding the construction of the replacement laboratories causes an impact on the clean up of the 300 Area. Could you please give me an explanation of why there was no budget request in the Office of Science, and whether the impact of the clean up of the 300 Area was taken into account when these budgets were formulated?

Answer. In the Deputy Secretary's December 15, 2005, approval of the preliminary baseline, the completion of PNNL's departure from the 300 Area was extended 15 months from October 2009 to March 2011. The extension will not affect the overall completion for the 300 Area cleanup scheduled for 2015 and greatly reduces the risk of interruption of Office of Science, National Nuclear Security Administration (NNSA), and Department of Homeland Security mission activities at PNNL.

As a result of the extension, major construction activities will commence in FY 2008. For FY 2007, NNSA, under its Defense Nuclear Non-Proliferation Research and Development program is requesting Preliminary Engineering and Design funding of \$3,700,000 and construction funding of \$4,220,000 for site preparation and long-lead procurements.

RESPONSE OF DR. ORBACH TO QUESTION FROM SENATOR SALAZAR

SCIENCE AND POLITICAL PRESSURES

Question 1. Director Orbach, I am impressed when a nominee to a science-related position boasts strong research credentials. It takes a scientist, I believe, to fully understand the importance of keeping politics out of science. I think you will agree with me that our researchers and scientists should not face repercussions when their experiments yield results that are politically inconvenient, nor should they be pressured to manipulate their results. Can I be assured that you will not tolerate political manipulations of science in the fields you oversee? What steps will you take and what policies will you implement to guarantee that DOE's researchers and scientists are insulated from political pressures?

Answer. The political leadership at the Department understands the importance of maintaining the integrity of science. We depend upon unvarnished research results to make critical decisions on which basic research paths to pursue and to determine the pathway for more applied research. I can assure the Congress that this tradition will be maintained at the Department of Energy.

RESPONSES OF DR. ORBACH TO QUESTIONS FROM SENATOR WYDEN

DOE ROLE IN RENEWABLE ENERGY AND OTHER TECHNOLOGY DEVELOPMENT

Question 1. Senator Gordon Smith and I are very interesting in accelerating the growth of the "Green Energy" technology and service businesses in Oregon. Do you have any perspectives on how we might partner with DOE labs and programs, especially in the renewables and materials research areas to make this happen?

Answer. The term "green power" or "green energy" generally refers to electricity supplied in whole or in part from renewable energy sources, such as wind and solar

power, geothermal, hydropower, and various forms of biomass. Increasingly, electricity customers are being given electricity supply options, either as retail power markets open to competition or when their regulated utilities develop green pricing programs. About 50% of retail customers in the United States now have an option of purchasing a green power product directly from their electricity supplier. DOE's National Renewable Energy Laboratory (NREL) operates and maintains the Green Power Network (GPN), which provides news and information on green power markets and related activities. The GPN maintains a website (<http://www.eere.energy.gov/greenpower/index.shtml>) that provides up-to-date information on green power providers, product offerings, consumer protection issues, and policies affecting green power markets. It also includes a reference library of relevant papers, articles, and reports. For more information on partnering with DOE laboratories on green power, I would refer you to DOE's Office of Energy Efficiency and Renewable Energy and to DOE's National Renewable Energy Laboratory. Many of the Office of Science laboratories perform work in materials sciences; however, the thrust of the research is not as closely tied to green energy as is that of NREL.

Question 2. In a UCLA oral-history interview that you gave in 1998, you said that you considered yourself a "Roosevelt Democrat" because your parents got government jobs after the Depression. What do you see as the role of the federal government in job creation today? Can you cite any examples of DOE-funded technology development or technology transfer projects that have spawned new businesses and created jobs?

Answer. The Department has a long history of significant contributions that have contributed to the Nation's competitiveness while spawning new industries and creating jobs for Americans. I am proud of that history and look forward to creating the tools and facilities and funding the research that not only will spur our economic development, but advance U.S. energy and national security. In the future, DOE research holds the potential to create exciting new industries in genomics, advanced computing, advanced materials, fusion, nuclear energy, and a myriad of other exciting possibilities.

Office of Science research investments have led to such innovations as the Nobel Prize-winning discovery of new forms of carbon, non-invasive detection of cancers and other diseases, improved computer models for understanding global climate change, and new insights on the fundamental nature of matter and energy. I would like to submit more detailed information for the record.

[The information follows:]

DOE ROLE IN RENEWABLE ENERGY AND OTHER TECHNOLOGY DEVELOPMENT

Some examples of DOE advances include:

Pioneering the Human Genome Project

The Office of Science initiated the Human Genome Project in 1986.

It also developed DNA sequencing and computational technologies that made possible the unraveling of the human genetic code and published a complete draft of the DNA sequence of the human genome in 2001.

This historic undertaking to discover the genetic blueprint of human beings will enable scientists to identify more genes responsible for diseases and develop new diagnostic and treatment possibilities.

Now the Office of Science is harnessing the biotechnology revolution to develop clean energy and repair damage to our environment through the Genomes to Life Initiative.

Enhancing National Security

The Office of Science has funded research leading to technologies that make our lives safer in many ways. These include:

- neutron detectors that can identify concealed nuclear weapons and land mines and are used for arms control and nonproliferation verification;
- new holographic computerized imaging technology that identifies hidden weapons, even non-metallic ones, through the clothing of airline passengers;
- smoke detectors that sense smoke by detecting changes in the ionization of the air; and
- advanced sensors that can detect explosives, narcotics, and chemical and biological agents—and many other innovations that will contribute to homeland security.

Improving Energy Security

The Office of Science has contributed to improved energy savings through several discoveries, including:

- lithium batteries that offer high-energy storage capacity and an environmentally benign alternative to the harmful lead used in conventional batteries;
- new and improved metals, plastics and other composite materials used in military hardware and motor vehicles; and
- superconducting wires that can lead to more efficient types of power generation, transmission, and electrical devices—and thereby save energy and reduce emissions.
- In addition, the Office of Science's research into fusion energy is poised to pay big dividends. Scientists are figuring out the way the sun and stars produce their energy—and that can have broad applications for mankind, since fusion power holds important promise as a clean, inexhaustible energy source.

Advancing Nuclear Medicine

The Office of Science and its predecessor agencies have been pioneering the field of nuclear medicine since the 1940's.

Researchers probably never anticipated when they started smashing atoms and protons in accelerators that their very basic research on matter—would eventually give us remarkable life-saving technology. Yet thanks to this rich legacy of research, doctors today rely on nuclear medicine to diagnose, evaluate and manage many types of disease.

Virtually all hospitals, as well as many clinics and private doctors' offices, perform nuclear medicine tests and scans. In fact, about 13 million nuclear medicine procedures are performed each year (or 35,000 each day) on patients here in the U.S.

Nuclear medicine is used to help patients with heart disease, cancer, lung disease, abdominal pain and gastrointestinal bleeding, thyroid disorders, epilepsy, infections and dementia. It also helps patients at risk of or recovering from strokes and at risk for stress fractures.

One of every three hospital patients in the U.S. benefits from nuclear medicine. About 10,000 cancer patients are treated every day with electron beams from linear accelerators.

Detecting and Diagnosing Medical Conditions

Many of medicine's most powerful diagnostic tools incorporate technology that physicists originally developed to explore the fundamental nature of matter. Magnetic resonance imaging (MRI), for example, is based on the principles of nuclear magnetic resonance, a technique used by researchers to obtain chemical and physical information about molecules.

The Office of Science is responsible for key advances in MRI, positron emission tomography (PET), and single-photon emission computed tomography (SPECT), which permit noninvasive and improved detection and diagnosis of medical conditions.

With PET and SPECT imaging, scientists now are making vital contributions to medical science's understanding of the molecular mechanisms of disease and the search for new treatments. Their current medical research priorities include drug addiction and substance abuse, aging and degenerative diseases, and the biology of tumors that may lead to more effective cancer therapies.

Treating Blindness—and Other Neurological Disorders

The Office of Science is now sponsoring research and development of an artificial retina, which can restore sight in blind patients with macular degeneration, retinitis pigmentosa, and other eye diseases. The research is being conducted at the Doheny Eye Institute, University of Southern California, in collaboration with North Carolina State University, Second Sight LLC, and five DOE national labs—Argonne, Lawrence Livermore, Los Alamos, Oak Ridge, and Sandia.

The artificial retina is a device that captures visual signals and sends them to the brain in the form of electrical impulses. The device is a miniature disc that contains an array of electrodes that can be implanted in the back of the eye to replace a damaged retina.

Visual signals are captured by a small video camera in the eyeglasses of the blind person and processed through a microcomputer worn on a belt. The signals are transmitted to the electrode array in the eye. The array stimulates optical nerves, which then carry a signal to the brain.

The technology that is being developed in the artificial retina project may be applied not only to the treatment of blindness but in the general field of neural pros-

theses. It may be adapted to help persons with spinal cord injuries, Parkinson's disease, deafness, and almost any other neurological disorder.

Expanding the Frontiers of Discovery

The Office of Science funded the research that led to one of the great intellectual achievements of the 20th century—and 13 Nobel Prizes: the discovery of all but one (the electron) of the most fundamental constituents of matter, namely quarks and leptons, which confirmed the Standard Model—physicists' current theory of matter and the forces of nature.

The Office of Science supported the 1996 Nobel Prize-winning discovery of a new form of carbon, known as "Bucky Ball," which is spurring a revolution in carbon chemistry and may lead to a profusion of new materials, polymers, catalysts, and drug delivery systems.

Now the Office of Science is underwriting research to solve the mystery of "dark energy," perhaps responsible for the remarkable recent finding that the expansion of the universe is accelerating, rather than slowing due to gravity as expected.

SOUND SCIENCE

Question 1. What are your views on the science of global climate change? Do you side with the National Academy of Sciences in their consensus-based report that climate change is a problem in the United States or with the Administration's party line that we need more research in this area before taking action?

Answer. The Administration and I consider global climate change a serious scientific and energy technology challenge. We are investing in the science to better understand both natural and human-induced climatic change and variation. Furthermore, we are investing in research to develop new energy technologies that will increase our energy security and reduce impacts on the Earth's environment. This includes research investments in fusion and conventional nuclear energy, ethanol and hydrogen energy, solar energy, and technologies for carbon sequestration.

RESPONSES OF MR. KARSNER TO QUESTIONS FROM SENATOR DOMENICI

ENERGY INDEPENDENCE

Question 1. What do you believe are the most important things we can do to move toward a significant lessening of our dependence on foreign sources of energy? Please be specific.

Answer. The most important things we can do to move toward significantly lessening of our dependence on foreign sources of energy include: 1) Enhancing the strategic policy environment with sufficient longevity, consistency, and visibility to regularly enable and further attract private sector capital for alternative fuels and technologies that can be sustained, predictable, and quantifiable; 2) Strengthening focus on private sector planning and deployment of available fuel alternatives to petroleum (and vehicles that can readily accept such fuels) by obtaining from market participants quantifiable escalating ramp rates for a nationwide plan of deployment. 3) Maximizing the leveraging role of the Federal procurement policy, addressing barriers to long-term purchase agreements and ensure that the agencies across the government are informed, unified, and as positive as possible.

Because the infrastructure and means of production, distribution, and delivery of alternative fuels and the vehicles that use them already exist, require relatively minor modifications, are reasonably economic (despite the present subscale business model), and will only improve with policies enabling durable market penetration and growth, it is of primary importance to objectively quantify the rate and costs of both planned and potential implementation. We must transform our transportation fleets to more efficient market compatible designs that reduce demand for petroleum, while moving rapidly towards multi-fuel vehicles, plug-in hybrids, and fuel diversification, as the President's Advanced Energy Initiative has called for.

BUILDING STANDARDS

Question 2. If confirmed, will you take the actions necessary to assure that this section is carried out?

Answer. If confirmed, I intend to take the actions necessary within my authority to carry out this section of the Energy Policy Act of 2005 and other sections for which this office would have responsibility.

ENERGY SAVINGS PERFORMANCE CONTRACTS

Question 3. Please tell the Committee what you believe would be an appropriate timetable for implementing the ESPC program and how the Committee might assist you in removing any barriers to implementation perceived by the Department.

Answer. The ESPC program is important for rapid, durable, and significant gains in our Nation's energy efficiency. If confirmed, I would look forward to working with you to see that barriers to implementation are addressed and removed at the earliest date practicable, so that these valuable gains can be harvested.

RESPONSE OF MR. KARSNER TO QUESTION FROM SENATOR CRAIG

Question 1. Within two weeks of your confirmation, would you be willing to discuss with the Committee a timeline for implementing loan guarantee provisions for renewable energy technology authorized in the Energy Policy Act of 2005?

Answer. If confirmed, I would be willing and available to discuss at any time the loan guarantee provisions for renewable energy technology. However, I will need to acquaint myself with the Department's institutional perspective on specific timelines for implementation of this provision of the Energy Policy Act. Should I be confirmed and establish myself within the Department, I will endeavor to relate to Congress the best information available to me as to specific timelines at the earliest possible date.

RESPONSES OF MR. KARSNER TO QUESTIONS FROM SENATOR MURKOWSKI

Question 1. Mr. Karsner: What are your feelings about finding money in DOE's budget in the coming year to promote geothermal energy? Just in my state of Alaska there are several geothermal projects that may well make economic sense, but there is still insufficient resource data to pinpoint the resource—DOE never fully finishing its geothermal site assessments in Alaska that you have finished for most of the rest of the country. With the Department's budget calling for ending all funding for geothermal, what is your position on the importance of geothermal energy and will you work with Congress to fund promising geothermal projects, if money would be restored to the budget to further geothermal projects?

Answer. I do not have sufficient knowledge to comment on the internal budgeting processes of DOE at this time, but if confirmed, I would be pleased to work with Congress in general and more fully review this issue with your office in particular. Geothermal energy is an important source of clean, reliable, domestic production of electricity and like other sources of renewable generation bearing these characteristics it should be maximized within the national portfolio to the extent it is technologically feasible and economically viable.

Question 2. In last year's Energy Policy Act, all forms of ocean energy (tidal, current, wave and thermal) were authorized for grant assistance and authorized for federal purchase credits. I can find no indication in the Department's budget of interest in promoting research to further ocean energy's potential? What is your opinion of the future of ocean energy and will you as the assistance secretary support ocean energy research in the future?

Answer. My personal opinion of ocean and tidal energy is based upon the limited exposure I have had to these technologies in the private sector. I believe enormous potential exists for the manifestation of ocean and tidal energy in greater scale, dependent upon siting conditions and project design parameters. Projects are currently proceeding in Europe and the Far East that may provide useful, market-based benchmarks as to the magnitude of the present opportunity. If confirmed, I will endeavor to understand the Administration's position on Federal funding and support of ocean energy research and the present state of the industry's evolution and timeline toward economic viability, and provide an informed response.

Question 3. On the subject of wind, the President's proposed '07 budget includes a small increase in federal funding to support wind turbine research and grants. The Department used to have a program where you would make grants available for the construction of working units to test the efficiency of new wind turbine designs. While wind is becoming a more mature technology, still as Congress considers withdrawing wind from eligibility for the production tax credit, it will be vital for turbines to become even more efficient so they can be cost competitive with other electrical generation technology. Would you support restitution of a modest technology development grant program for wind devices?

Answer. In general, support for technology development grants for wind devices depends upon many specific factors relating to the particular device in question, including (amongst others): the specific intended use of the device, the actual and projected market demand or need of such a device, the net economic benefit of such

a device over comparable devices, and above all, the significance of the projected benefit to the public for use of public funds. If confirmed, I would consider programs in this context.

Question 4. Concerning small-scale hydroelectric development, there are many creeks in this nation and lakes that could fuel small hydro power plants, those generating less than 10 megawatts of power, if there was some economic assistance available to defer design or construction costs. What is your attitude toward a possible revolving loan program or grant assistance program to facilitate small hydro development?

Answer. I am interested and supportive of the expansion and broad diffusion of clean, renewable, domestic distributed sources of energy, including small and micro-hydropower. If confirmed, I am hopeful that market-worthy funding mechanisms, with some degree of shared risks can be considered to facilitate a reliable pattern of growth for such sources.

Question 5. And I would like to hear your views on the federal role in development of closed-loop biomass power. The Energy Bill last year provided grant assistance for biomass developments, but the Department has shown no signs yet of attempting to implement that grant program. As assistant secretary what is your level of interest in attempting to facilitate biomass electricity projects nationwide?

Answer. If confirmed as assistant secretary, I would maintain my present, high level of interest in attempting to facilitate biomass projects nationwide. My personal view on the Federal role in the development of biomass power is that stable, predictable, long-term policies must be in place to attract and regularize capital formation for beneficial sources (like biomass) that are substantially viable. This is consistent with my view on the Federal role for all forms of renewable power generation.

RESPONSES OF MR. KARSNER TO QUESTIONS FROM SENATOR SMITH

Question 1. Section 1802 of EPAct 2005 called for a study of the energy efficiency programs and how energy should be measured. The study is due by August 2006 and I am concerned that it may not get done in a timely manner.

Answer. I share your concerns for energy efficiency and, if confirmed, I shall endeavor to meet the obligations in a timely manner.

Question 2. What is the status of the study? Has DOE contracted with the National Academy of Sciences? If DOE has not moved ahead with this study, what are the reasons? What will DOE do in the next few months to get this study done on time?

Answer. I am not privy to the details surrounding this study or the actions taken by DOE regarding this matter. If confirmed, I will be pleased to work with your office upon investigating the status of this study.

Question 3. Attached is a letter I recently received from a State Representative expressing concern about the Department's schedule for promulgating the guidance for cellulosic ethanol facilities. I share Representative Smith's concerns about the timeframe. Can you please respond to the issues raised in the attached letter? Please let me know how quickly the Department can promulgate rules and procedures for the renewable fuels standard as it related to cellulosic ethanol.

Answer. I appreciate your sharing the content of this letter with me and I empathize with the developer's concerns and the need to remove any lingering uncertainty relative to these provisions and guidance. At this time, I cannot respond with any authority to the legal questions raised and under review by the Department, nor am I able to ascertain or speak for the Department's present rate for promulgation of rules and procedures for the renewable fuels standards. If confirmed, I assure you that your inquiries, those of Representative Smith, and the outstanding issues affecting the developer's project risks shall be addressed with respect and sensitivity to Oregon Ethanol's financial closing and construction timetable.

RESPONSES OF MR. KARSNER TO QUESTIONS FROM SENATOR BINGAMAN

FEMP AND RENEWABLE ENERGY PURCHASE PROGRAM

Question 1. Will you commit to fully supporting the Federal Energy Management Program and the renewable energy purchase program within the Department?

Answer. I am not fully aware of all of the details surrounding this program but I fully support the objectives of the Federal Energy Management Program as I understand them.

RENEWABLE ENERGY PRODUCTION TAX CREDIT

Question 2. How important is renewable energy production tax credit to promoting greater use and development of renewable energy resources?

Answer. At present, the renewable energy production tax credit is critically important to the investment decisions of developers and equity investors currently responsible for funding renewable energy resources and facilities. Greater use of renewable energy occurs, as more installed capacity becomes available. The Production Tax Credit ("PTC") is not the exclusive method for promoting these ends and it is rarely used as a policy tool outside the United States.

Question 3. Do you support the extension of the renewable energy production tax credit?

Answer. Yes, presently I do. My continuing support of a PTC as a primary policy stimulus is relative to the probability of satisfying the greater need to devise durable, predictable, long-term, strategic policies that persist without interruption and enhance the rate of investment, deployment, availability, and use of renewable energy technologies. If confirmed, I shall continue to stress the need for continuity and predictability in revenue forecasting in order for clean, domestic sources of renewable energy to grow at the fastest rate possible.

SOLAR AMERICA INITIATIVE

Question 4. It is my understanding that, within the Solar America Initiative, the national laboratories will only play a supporting role in research, and that they will not be directly tied to any one industry-led team. If confirmed, will you please ensure that national laboratories, such as Sandia, can directly participate in industry-led teams, through CRADAs or other intellectual property sharing arrangements, to further the overall technical success that the industry hopes to achieve?

Answer. Regrettably, I have no knowledge about the internal deliberations of DOE and the formative details of the Solar America Initiative. I am aware of the value of industry-led partnering and public-private partnerships in cases where the contractual structure assures fair and mutual benefit. If confirmed, I shall investigate how such arrangements may add value in this context.

Question 5. If confirmed, will you ensure that the overall management of the program will be at the DOE Headquarters' level and that participation will be open to all National Laboratories based upon technical merit?

Answer. If confirmed, I will investigate the details of the program in question and determine the definitive structure and location of the overall management of the program and evaluation criteria for participation.

RESPONSE OF MR. KARSNER TO QUESTION FROM SENATOR AKAKA

Question 1. As you may know, renewable energy is an extremely important issue for me, because Hawaii is currently very dependent on oil for its energy. I believe that renewable energy holds the key to Hawaii's energy future, and that is one of the reasons why I proposed the Hawaii Energy Study last year that was enacted in the Energy Policy Act of 2005. In your view, what needs to be done to ensure that the energy needs of Hawaii are adequately evaluated and addressed?

Answer. I share your view that renewable energy can and should be a key element of Hawaii's energy future. My personal view is that a coordinated effort, from the ground up, including municipal, county, state, and federal governments and key stakeholders, including, but not limited to the public utilities, transport sector, and private sector would be essential to evaluate and address the energy needs of Hawaii's unique community, geography, and environment. Moreover, if successful in transforming its energy economy, Hawaii could be viewed as a valuable policy microcosm and incubator for the Nation at large. The probability of success will depend on the degree of consistent and firm local and state leadership. If confirmed, I would be pleased to support such leadership and planning to the extent of my authority allows me.

RESPONSES OF MR. KARSNER TO QUESTIONS FROM SENATOR SALAZAR

Question 1. The National Renewable Energy Laboratory (NREL) in Golden, Colorado, is the Department of Energy's premiere national laboratory for renewable energy and energy efficiency research and development. NREL funding in FY07 is projected to increase from \$161.6 million (the FY06 appropriation) to \$175.5 million under the President's budget request submitted to Congress last month. This proposed budget increase represents an important first step in the right direction, but we can and must do better. In December, I joined over 30 members of the Senate to support full authorized funding for the renewable and energy efficiency programs

in the energy bill. Providing NREL with the resources it needs will lead our nation to greater energy independence and security.

If confirmed, what steps will you take to ensure that funding for NREL will be protected in the Department's FY08 budget request?

Answer. It seems clear that the administration views the importance of NREL in a similar vein, as President Bush recently became the second President to personally visit NREL since it became a national laboratory. I have not been privy to the internal deliberations of DOE and the Administration's budget formulation for the forthcoming FY08 budget request. It is my understanding that they are moving towards a planned completion in the next six weeks. If confirmed in a timeframe to have an impact on the FY08 budget planning cycle, I shall investigate the detail of NREL's funding and look forward to working closely with your office regarding this and other NREL concerns.

Question 2. We are at a critical juncture in our efforts to develop a sustainable plan to achieve energy independence in the 21st Century. The country can ill-afford more job cuts at NREL, now or at any time in the next two decades. Do you agree with my assessment that we must substantially increase our investment in renewable energy and clean energy technologies to reduce our dependence on foreign oil?

Answer. Yes, I agree that substantial increases in investment in renewable energy and clean energy technologies are necessary to reduce our dependence on foreign oil. The investment and the growth in investment is presently, appropriately led by private sector capital, which at the current rate increasingly dwarfs the public sector expenditure towards this objective. Therefore, we must be mindful of continuously cultivating and encouraging private sector investment growth to meet such national objectives as reducing our dependence on foreign oil and utilizing the public sector investment in renewable energy to maximize its benefits, efficacy, relevance, and impact.

Question 3. In a 2004 election statement, you described the Production Tax Credit (PTC) as "the essential component of growing and expanding emissions-free electricity generated from wind, solar, and biomass." Will you support a five-year extension of the PTC for renewable energy?

Answer. I affirm that the PTC was in 2004, and remains today, the essential component of growing and expanding emissions-free electricity generated from wind, solar, and biomass in the United States. However, it is not an exclusive component, or necessarily the most ideal component, particularly given the consequences of its historically erratic implementation. If confirmed, I would be pleased to be part of an open dialogue on the future role and attributes of the PTC.

Question 4. Section 141 of the Energy Policy Act of 2005 requires the Secretary of Energy to report to Congress on each new or revised energy conservation standard, which the Secretary has failed to issue by its statutory deadline. In its report, the DOE committed to issuing at least one new or amended standard for all products in the 'backlog' no later than June 2011. I appreciated your commitment today to making this a priority. What steps will you take expeditiously to issue new standards for the 18 products now in the backlog?

Answer. Unfortunately, I have not had sufficient exposure to DOE's internal processes as yet to comment on the backlog that has accrued. If confirmed, I shall review this matter to uncover what, if any, steps may be taken in compliance with the rules of procedure, to assure timely issuance.

Question 5. In December, DOE and EPA announced an Energy Efficiency Action Plan to spur investment in efficiency by electric and gas utilities. If confirmed, will this Action Plan be a priority for you? When will the Department implement this Action Plan?

Answer. If confirmed, I would look forward to reviewing the Energy Efficiency Action Plan released last year, and understanding how it has been internally managed at DOE and the timetable for implementation. In general, I view energy efficiency as a priority for the Nation, particularly at a time of war. If confirmed, my management priorities shall emphasize significance of impact in achieving durable energy efficiency gains.

Question 6. What are your plans, if any, to get "green building" research and technologies into the marketplace?

Answer. This field has not been part of my professional experience and therefore requires more listening than direction at the outset. Like other new technologies, there remains the challenge of conforming to demands of the existing marketplace, including, pricing and costs, strength of warranty and serviceability, qualifications and licensing of installers and other professionals, consistent availability of products and services, aesthetics and performance characteristics, and public knowledge and acceptance. If confirmed, I would look forward to having a more detailed understanding from perspectives inside DOE, the labs, and industry as to the state of

green building research and technologies and work together regarding plans for accelerating market penetration.

RESPONSES OF MR. KARSNER TO QUESTIONS FROM SENATOR WYDEN

Question 1. As part of the bipartisan agenda for Oregon that Senator Gordon Smith and I announce each Congress, we have called for promoting efforts to bring green energy technology and companies to Oregon. According to your bio, you are "a leading advocate for alternative energy solutions." How would you advise Oregon and other states interested in promoting green energy technologies as a strategy for economic development accomplish this goal? What can the Federal government do to assist this type of initiative?

Answer. Most of my professional experience advocating alternative energy solutions has been in the context of international development, and I am still familiarizing myself with the many state policies and programs that are being pursued and considered. I am aware that Oregon and other states are already acting decisively in promoting green energy technologies as a strategy for economic development and these efforts are quite commendable.

Many states are accomplishing measurable and substantive progress, which has been evidenced by the extraordinary growth rates in wind, solar and other renewable technologies. Undoubtedly, more could be done to continue the evolution of market maturation and potentially accelerate this trend. For example, local and state governments could be encouraged to identify and quantify their market objectives for sustained, long term procurement of clean energy products and services with greater precision. In a similar vein, multi-year solicitations of term and tenure that would allow considerations of merit for job creation, training, facility development, and such other benefits that may accrue with greater stability of revenue forecasting could be devised for use in several jurisdictions.

Educating and training of procurement officials, qualified installers, and service and maintenance personnel is also lagging product growth and technology maturity and is a requisite for economic integration of these new technologies. These are but a few of the concepts and policies that are too numerous to list, but that are part of the growing national dialogue on expanding these technologies.

With respect to the economic development initiatives of the respective states, the Federal government has a limited, but important role in convening, stewarding, and diffusing best practices, and where appropriate and authorized, undertaking shared risks. There may exist other roles for the Federal government, particularly through its procurement practices, as well as the role these domestic, reliable, and agile technologies play in securing homeland defense. If confirmed, I would be pleased to interact with your office to explore the possibilities in this regard.

Question 2. *The Washington Post* recently reported on how states are pursuing their own energy efficiency standards for appliances and other products because the Federal government has failed to take steps required by law. Do you agree that states should be able to step in to fill the gap when the Federal government is leaving a regulatory vacuum?

Answer. I did not read the article you cite as the basis of the question and therefore cannot comment on its contents directly. It is certainly a situation that requires attention. If confirmed, I would treat appliance standards as a priority.

Question 3. *The Washington Post* recently reported that the Bush Administration "has not decided if it should implement some new rules for appliance energy efficiency standards or update some old ones, for example, even though legal deadlines have passed for numerous appliances." How do you defend the Energy Department's failure to take these legally required actions? If you don't defend them, what would you do to prevent this dereliction of legal duty if you are confirmed?

Answer. I am not privy to the internal deliberations of DOE and I cannot authoritatively speak for the Administration on this matter or the veracity of the article cited. To my knowledge, the Department has published a schedule detailing the precise plan for implementation of the outstanding appliance energy efficiency standards. If confirmed, it is my intent to examine the detail of this schedule and fulfill all the duties for which I would be responsible, and of course, remain in compliance with the law.

Question 4. Do you support a permanent extension of the renewable energy production tax credits provided by the Energy Policy Act of 2005?

Answer. I am eager to have an open dialogue with Congress, as well as stakeholders on the renewable energy production tax credits, including their duration. My support of a PTC as a primary policy stimulus is relative to the probability of satisfying the greater need to devise durable, predictable, long-term, strategic policies that persist without interruption and enhance the rate of investment, deployment,

availability, and use of renewable energy technologies. If confirmed, I shall continue to stress the need for continuity and predictability in revenue forecasting in order for clean, domestic sources of renewable energy to grow at the fastest rate possible.

Question 5. What do you see as the federal government's role in scaling up the production of green buildings, especially the types of buildings that dominate fast growing areas of the country like tract housing, shopping centers, schools, airports and speculative office buildings?

Answer. This field has not been part of my professional experience and therefore requires me to become better acquainted with the details of the issue. Like other new technologies, there remains the challenge of conforming to demands of the existing marketplace, including, pricing and costs, strength of warranty and serviceability, qualifications and licensing of installers and other professionals, consistent availability of products and services, aesthetics and performance characteristics, and public knowledge and acceptance. If confirmed, I would be pleased to work with your office on the possibilities for stimulating greater scale in the production of green building and greater efficiency in the built environment.

**RESPONSES OF MR. KARSNER TO QUESTIONS FROM SENATOR AKAKA
SCIENCE AND MATH EDUCATION**

Question 1. I am pleased to see that in your testimony you have indicated that one of the crucial roles for your position is to boost science and math education. Given that we are losing our scientific and technological advantages to India, China, and other countries, what measures are you going to take to encourage our youth to enter the fields of math and science?

Answer. If confirmed as Under Secretary, I would take this as a significant mission of my office. The Office of Science's Workforce Development for Teachers and Scientists program has developed a grade-school to grad-school plan for support of career enhancements in science and engineering. The first of these efforts are the Middle School and High School Science Bowls. These events have about 17,000 students participating in various academic, scientific, and engineering events and competitions that culminate in national events here in Washington with participants from all around the nation. These events are rewarding and exciting for the many students involved.

Our national laboratories have numerous programs to support regional school science and math activities. Most of these activities are organized out of the national laboratory education offices. As a few examples, there are national laboratory workshops for science teachers, very popular "Science Saturday" lectures for local high school and middle school students, and an extensive array of mentor-intensive research internships for high school through graduate school students. The laboratories have also prepared some wonderful web-based teaching materials for elementary and secondary school students and teachers. The President's FY 2007 budget request triples the number of teachers in this program to a total of 300.

Possibly the most effective approach we are using is to bring teachers of science and math to our labs for extended summer research experiences where the teachers are transformed from teachers of science into "teacher-scientists." These teachers through their connections to and support from the national laboratory scientific communities serve as both leaders in their schools for science and math and also as inspirations to their students.

Question 2. As you may know, renewable energy is an extremely important issue for me, because Hawaii is currently very dependent on oil for its energy. I believe that renewable energy holds the key to Hawaii's energy future, and that is one of the reasons why I proposed the Hawaii Energy Study last year that was enacted in the Energy Policy Act of 2005. In your view, what needs to be done to ensure that the energy needs of Hawaii are adequately evaluated and addressed?

Answer. I share your view that renewable energy can and should be a key element of Hawaii's energy future. My personal view is that a coordinated effort, from the ground up, including municipal, county, state, and federal governments and key stakeholders, including, but not limited to the public utilities, transport sector, and private sector would be essential to evaluate and address the energy needs of Hawaii's unique community, geography, and environment. Moreover, if successful in transforming its energy economy, Hawaii could be viewed as a valuable policy microcosm and incubator for the Nation at large. The probability of success will depend on the degree of consistent and firm local and state leadership. If confirmed, I would be pleased to support such leadership and planning to the extent of my authority allows me.

NUCLEAR SAFETY

Question 3. As a member of the Committee of Homeland Security and Governmental Affairs, I have become very familiar with the issue of nuclear safety. I am concerned by the potential safety risks that might be associated with the security of our nuclear power plants. As the Assistant Secretary for Energy, what plans do you foresee in the future that will assist in ensuring the safety of our nuclear facilities?

Answer. The U.S. Nuclear Regulatory Commission (NRC) is responsible for ensuring the safety and security of nuclear power plants. I would note that as the Chief Operating Officer responsible for two nuclear facilities, I was responsible for safety, security and operations during a time period before and after September 11, 2001. As such, I was responsible for leading the security upgrades that were put in place after September 11, 2001. From that perspective as well as the overall record of the U.S. nuclear industry, I would conclude that nuclear plants are among the safest and most secure facilities in the country.

RESPONSES OF MR. SPURGEON TO QUESTIONS FROM SENATOR DOMENICI

PERFORMANCE MEASURES

Question 1. The Department of Energy is engaged in a comprehensive strategy that would lay the foundation for expanded use of nuclear energy in the U.S. and the world by demonstrating and deploying new technologies that recycle nuclear fuel, significantly reduce waste, and address proliferation concerns.

What performance measures do you think would be appropriate to ensure meaningful progress and successful implementation of this comprehensive strategy?

Answer. My approach to the management and execution of this comprehensive strategy for global use of nuclear energy will utilize knowledge and experience I have gained working in the Federal government and industry and directly apply them to this broad international program. While I am not yet at DOE, if confirmed, I will establish performance measures for the technology demonstration phase that are consistent with meeting the goals established by the President and Secretary Bodman for the Global Nuclear Energy Partnership. If I am confirmed, I will provide an initial set of performance measures that are aggressive, but achievable, and would support the objectives of the Global Nuclear Energy Partnership and expand the use of nuclear power that is proliferation resistant. These measures would provide the roadmap by which DOE would complete the research on the technology and be prepared to proceed with the engineering scale demonstrations.

NUCLEAR POWER RENAISSANCE

Question 1. The United States is significantly behind many other nations in its pursuit of modern nuclear power.

What suggestions do you have for ways to revitalize U.S. innovation and manufacturing capability to support the nuclear power renaissance?

Answer. If confirmed as Assistant Secretary for Nuclear Energy, my highest priority will be to work with industry on achieving new nuclear plant orders. With the efforts of the Administration and industry over the last few years and the incentives for new nuclear generation provided by the Energy Policy Act of 2005, I believe we will see new plants built in the U.S. over the next few years. I also believe that as industry moves forward with new plants, U.S. businesses will follow with the innovation and the domestic industrial base that is needed to support a new generation of plants. That said, I recognize that there are areas in which government and industry need to work together to encourage additional manufacturing capability, such as with large-forgings which are presently only available through overseas suppliers, and also with respect to the need for increased numbers of trained and qualified personnel to support new nuclear plant construction (welders, pipe fitters, boilermakers, etc.). If confirmed, I look forward to working with Congress and industry to ensure that the nuclear manufacturing base in the U.S. is adequate to support building of new nuclear plants.

RESPONSE OF MR. SPURGEON TO QUESTION FROM SENATOR CRAIG

MEETING ON NGNP

Question 1. Within two weeks of your confirmation, would you be willing to discuss with the Committee a side-by-side comparison of all program plans for the Project described in Section 641 of the Energy Policy Act of 2005, including the plan

recently reviewed by the NERAC as well as the Idaho National Laboratory's NGNP Project Plan, to include best available estimates thru Project completion comparing critical decision timelines, RFP timelines, NRC milestones, in-kind and cost share assumptions, and annual budget estimates?

Answer. I recognize that the *Next Generation Nuclear Plant* is an important priority of the Energy Policy Act of 2005, and if confirmed, I look forward to meeting with you to discuss a side-by-side comparison of program plans for the project. I would propose to proceed with such a discussion after I have had an opportunity over the first few weeks to travel to Idaho and meet with the Idaho National Laboratory on the project. It is my understanding that the Department has tasked the Idaho National Laboratory to serve as the project manager for the Next Generation Nuclear Plant. As such, a meeting with the laboratory is needed in order to more fully understand the status of the research and planning associated with the development of a reactor system that could be used for electricity and hydrogen production.

RESPONSE OF MR. SPURGEON TO QUESTION FROM SENATOR THOMAS

URANIUM

Question 1. While I understand that the uranium stockpile is dealt with in the Office of Environmental Management at the Department of Energy, I presume that your nomination to the Assistant Secretary position is indicative of an ability to speak with authority on all issues related to nuclear energy. I would like you to explain the Department's position on the sale of government uranium stockpiles. This is an important issue to me given the significant and growing role of the uranium mining industry in my home-state of Wyoming. Will you support the use of DOE uranium stockpiles as a strategic reserve for national energy security purposes, instead of using them to raise relatively small amounts of money for DOE projects and the U.S. Treasury? Do you support our domestic mining industry's efforts to provide competitive supplies of uranium to cover existing and future demand without Federal interference in the marketplace?

Answer. The Office of Nuclear Energy should strive to foster all sectors of the nuclear industry, including uranium mining. From a personal perspective, from 1977 through 1985, I was an executive with UNC, which was one of the largest independent uranium mining companies in the United States. We operated a subsidiary, Teton Exploration Drilling, which was headquartered in Casper, Wyoming.

To ensure a secure and reliable supply of uranium in the United States, I believe the nation needs a competitive domestic mining industry today and in the future. I am pleased that the uranium industry has started to rebound over the last several years with the price of uranium increasing to levels not seen since the late 1970s as the market adjusts to worldwide demand.

If confirmed, I will closely monitor the Department's activities with respect to its natural uranium stockpiles, including those instances in which the Government intends to introduce its inventory into the marketplace.

RESPONSES OF MR. SPURGEON TO QUESTIONS FROM SENATOR BINGAMAN

GNEP AND GEN IV

Question 1. The Department of Energy is proposing the Global Nuclear Energy Partnership Program, GNEP, as well as the Generation IV reactor program. Both involve large capital outlays for reprocessing plants, fast burner reactors, and high temperature gas cooled reactors. Can you please provide the committee with the overall cost estimates and timing of each of these facilities proposed to be built within the GNEP Program and the Generation IV reactor Program?

Answer. While I am not presently working at DOE, if confirmed, I would be pleased to provide information on the anticipated cost of the GNEP technology effort and its relationship to the Generation IV nuclear systems initiative. If I am confirmed, my goal will be to ensure prudent achievement of cost and schedule milestones through the rigorous implementation of best project management practices.

UNIVERSITY REACTOR AND ENGINEERING PROGRAM

Question 2. The President's budget request for fiscal year 2007 proposes to zero out the university reactor and engineering program. Can you please provide me with what costs will be left to the university reactor programs in terms of student training as well as fuel costs normally provided under this program that the university communities must now bear?

Answer. While I am not familiar with this issue yet, if confirmed, I pledge to get back to you with more information on the impact to the universities from the proposed termination of the University Reactor Infrastructure and Assistance Program. As a personal note, my own thesis on design studies for a high flux research reactor at Massachusetts Institute of Technology was funded through an Atomic Energy Commission grant.

UNIVERSITY REACTOR AND ENGINEERING PROGRAM

Question 3. The Department's budget request for fiscal year 2007 states that industry can now pick up the costs of training future students and university reactors. Has the Department received any express statement from industry that it is doing so?

Answer. While I do not know whether industry has expressed its intention to provide additional assistance to university nuclear engineering programs, if confirmed, I pledge to examine this issue more closely and get back to you with an answer.

RESPONSES OF MR. SPURGEON TO QUESTIONS FROM SENATOR AKAKA

NUCLEAR SAFETY

Question 1. As a member of the Committee of Homeland Security and Governmental Affairs, I have become very familiar with the issue of nuclear safety. I am concerned by the potential safety risks that might be associated with the security of our nuclear power plants. As the Assistant Secretary for Energy, what plans do you foresee in the future that will assist in ensuring the safety of our nuclear facilities?

Answer. The U.S. Nuclear Regulatory Commission (NRC) is responsible for ensuring the safety and security of nuclear power plants. I would note that as the Chief Financial Officer for a licensed nuclear facility, I was responsible for safety, security and operations during a time period before and after September 11, 2001. As such, I was responsible for leading the security upgrades that were put in place after September 11, 2001. From that perspective as well as the overall record of the U.S. nuclear industry, I would conclude that nuclear plants are among the safest and most secure facilities in the country.

SCIENCE AND MATH EDUCATION

Question 1. I am pleased to see that in your testimony you have indicated that one of the crucial roles for your position is to boost science and math education. Given that we are losing our scientific and technological advantages to India, China, and other countries, what measures are you going to take to encourage our youth to enter the fields of math and science?

Answer. If confirmed as Under Secretary, I would take this as a significant mission of my office. The Office of Science's Workforce Development for Teachers and Scientists program has developed a grade-school to grad-school plan for support of career enhancements in science and engineering. The first of these efforts are the Middle School and High School Science Bowls. These events have about 17,000 students participating in various academic, scientific, and engineering events and competitions that culminate in national events here in Washington with participants from all around the nation. These events are rewarding and exciting for the many students involved.

Our national laboratories have numerous programs to support regional school science and math activities. Most of these activities are organized out of the national laboratory education offices. As a few examples, there are national laboratory workshops for science teachers, very popular "Science Saturday" lectures for local high school and middle school students, and an extensive array of mentor-intensive research internships for high school through graduate school students. The laboratories have also prepared some wonderful web-based teaching materials for elementary and secondary school students and teachers. The President's FY 2007 budget request triples the number of teachers in this program to a total of 300.

Possibly the most effective approach we are using is to bring teachers of science and math to our labs for extended summer research experiences where the teachers are transformed from teachers of science into "teacher-scientists." These teachers through their connections to and support from the national laboratory scientific communities serve as both leaders in their schools for science and math and also as inspirations to their students.

RENEWABLE ENERGY

Question 1. As you may know, renewable energy is an extremely important issue for me, because Hawaii is currently very dependent on oil for its energy. I believe that renewable energy holds the key to Hawaii's energy future, and that is one of the reasons why I proposed the Hawaii Energy Study last year that was enacted in the Energy Policy Act of 2005. In your view, what needs to be done to ensure that the energy needs of Hawaii are adequately evaluated and addressed?

Answer. I share your view that renewable energy can and should be a key element of Hawaii's energy future. My personal view is that a coordinated effort, from the ground up, including municipal, county, state, and federal governments and key stakeholders, including, but not limited to the public utilities, transport sector, and private sector would be essential to evaluate and address the energy needs of Hawaii's unique community, geography, and environment. Moreover, if successful in transforming its energy economy, Hawaii could be viewed as a valuable policy microcosm and incubator for the Nation at large. The probability of success will depend on the degree of consistent and firm local and state leadership. If confirmed, I would be pleased to support such leadership and planning to the extent of my authority allows me.

NUCLEAR SAFETY

Question 1. As a member of the Committee of Homeland Security and Governmental Affairs, I have become very familiar with the issue of nuclear safety. I am concerned by the potential safety risks that might be associated with the security of our nuclear power plants. As the Assistant Secretary for Energy, what plans do you foresee in the future that will assist in ensuring the safety of our nuclear facilities?

Answer. The U.S. Nuclear Regulatory Commission (NRC) is responsible for ensuring the safety and security of nuclear power plants. I would note that as the Chief Operating Officer responsible for two nuclear facilities, I was responsible for safety, security and operations during a time period before and after September 11, 2001. As such, I was responsible for leading the security upgrades that were put in place after September 11, 2001. From that perspective as well as the overall record of the U.S. nuclear industry, I would conclude that nuclear plants are among the safest and most secure facilities in the country.

RESPONSES OF MR. BERNHARDT TO QUESTIONS FROM SENATOR DOMENICI

OCS LEASING AND ROYALTIES

Question 1. In S. 2253, we direct the Secretary of the Interior to lease parts of the 181 area as soon as practicable, but in no case later than one year from the date of enactment. Can you assure me that the Interior Department will comply with this statutory deadline? Please explain.

Answer: If S. 2253 is enacted, the Interior Department will work expeditiously to comply with it. Although The Minerals Management Service would have primary responsibility for implementation of this legislation, if I have the privilege to be confirmed, I will work to ensure MMS receives the legal support it needs to promptly move forward according to the statutory timeframe.

Question 2. Please discuss the process for completing the 5-year leasing plan on the Outer Continental Shelf. Specifically, can you tell me whether the Department of the Interior is permitted to remove areas from the Final 5-Year Plan that have been included in the Draft Proposed 5-Year Plan, and if the Department has done that before?

Answer. In terms of process, the next phases of completing the 5-year offshore leasing program for 2007-2012 are (1) analysis of comments received on the draft proposed 5-year program; (2) development and publication of the proposed 5-year program, accompanied by a draft environmental impact statement (EIS); (3) consideration of comments on those documents; (4) publication of a preliminary final 5-year program that is submitted to Congress, together with a final EIS; and (5) adoption of the final 5-year program.

The Department can remove areas from a draft proposed 5-year oil and gas leasing program and has done so in the past. In addition, the Secretary may make changes on a sale-by-sale basis after a Final 5-year oil and gas leasing program is adopted. In the case of the 1992-1997 Program, both the draft proposed program and the proposed program contained a sale in either Navarin Basin, Norton Basin, or St. Matthew-Hall in Alaska. No sale was included in the Final Program. For the

1987-1992 Program, the proposed program included an “acceleration” provision, that if there was a significant discovery in a frontier area, the next sale could occur on a 2-year rather than 3-year cycle. This provision was not included in the final program. In addition, after the 1992-1997 5-year program was approved, the Secretary modified the area to be offered in Sale 181.

Question 3. In a series of New York Times articles, the issue has been raised as to whether the Federal Government is receiving all applicable royalties with respect to oil and gas leases on Federal submerged lands. Do you wish to comment regarding the nature and merits of these claims?

Answer: I understand the representatives of the Minerals Management Service have presented to the Congress their response to the various New York Times articles. If I have the privilege to be confirmed as Solicitor, I will work to ensure that the Solicitor's Office will continue to assist the MMS in ensuring that Federal oil and gas lessees on the Outer Continental Shelf pay all royalties owed to the government for oil and gas produced from their leases.

Question 4. Additionally, will you keep this committee apprised of any resolution of any current disputes with respect to royalty payments?

Answer. Yes. I would like to work with your staff to ensure that the Committee is adequately advised to assist in the Committee's oversight of MMS' royalty enforcement and collection functions.

Question 5. Further, will you please forward to my staff any relevant, non-privileged documents with respect to this dispute?

Answer. Yes. I understand this question to refer to question number 3 above. The Department is in the process of responding to requests for documents from other Congressional committees related to the allegations in the New York Times articles and specific royalty litigation matters, and I will work with your staff to find a means to ensure that the Committee receives the materials it wants.

CAPE WIND

Question 1. In Section 388 of the Energy Policy Act of 2005, Congress grants the Department of the Interior primary authority over alternative energy on the offshore (renewable energy). Can you comment with respect to the schedule for all environmental studies to be done on the Cape Wind project off of the Massachusetts coast?

Answer. It is my understanding that in September of 2005, Cape Wind Associates submitted an application to the MMS for leases, easements or rights of way under section 388 of the Energy Policy Act of 2005, for purposes of constructing a wind energy project located in Federal waters 4.7 miles offshore of Cape Cod, Massachusetts. This is the first project of its kind in Federal waters, and the first application filed pursuant to Section 388.

The Minerals Management Service has determined that to comply with the requirements of the National Environmental Policy Act, an Environmental Impact Statement is necessary. The MMS is currently negotiating a Memorandum of Agreement with Cape Wind Associates for purposes of designating a contractor to assist in the preparation of the EIS as authorized by CEQ regulations at 40 CFR 1506.5(c). It is my understanding that the Memorandum of Agreement is expected to be finalized shortly. Following that, the MMS plans to issue a Notice of Intent to Prepare an EIS, seeking public comment for scoping purposes and to identify issues that will be needed to be addressed in the EIS. That comment period will last 45 days, and the EIS process will begin shortly thereafter.

INDIAN TRUST OBLIGATIONS

Question 1. Mr. Bernhardt, the *Cobell v. Norton* litigation has been a big black eye for the Department of Interior and, from my perspective, has impaired the Department's ability to be successful in the administration of its other duties. One example of this is the Department's refusal to provide funding for Pueblo attorneys' fees in the *Aamodt* case. This would be the first time since 1974 that funds for that purpose have not been provided. More generally, I am frustrated with this Administration's response to the New Mexico Indian water rights settlements.

Why has the Department refused to disburse funds to pay for Pueblo fees associated with the *Aamodt* case?

Answer. I have visited with Associate Deputy Secretary Cason regarding this matter. He has advised me that he is working to meet with persons in New Mexico to find a satisfactory outcome to this matter. The United States was required to pay over \$7 million to the Cobell plaintiff's attorneys. It is my understanding that the Department does not budget for potential contingent liabilities, and I understand that in many years a variety of the Department's bureaus pay attorney fee awards.

In this instance, I understand that the Department used several sources of funds to pay the fee award. The Bureau of Indian Affairs contributed \$3 million, including \$2 million from an account that is used to reimburse tribal attorneys' fees.

Question 2. In general, do you feel that the Cobell litigation has impaired the Department's ability to fulfill its trust obligations to the Indian nations?

Answer. Over the last ten years, the Cobell litigation has proceeded down a pathway that few could have envisioned, when it was filed. The full impact of this litigation on other priorities for Indian Country may not be well recognized. While the budgetary impact is obvious to all of Indian Country, I believe the challenges presented with this litigation have demanded the focus and effort of the Department's most senior management, which has meant that that senior decision makers have not been able to give all of their time and attention to other pressing priorities within Indian Country.

Question 3. How has the expense of the Cobell litigation impacted the budgets of programs you are responsible for administering?

Answer. The litigation has had a profound effect on the Department, including the budget for Indian programs. In terms of programs I am personally responsible for, as I mentioned in my testimony before this Committee, the employees in the Office of Solicitor have been disconnected from the Internet since December 2001. This lack of access constitutes a serious loss in productivity which, I believe, has a very significant cost to the Office of the Solicitor each year. For over four years, over three hundred attorneys have been unable to communicate with their client representatives, other federal attorneys, or the public via email. The Office of the Solicitor has been unable to utilize internet-based tools to conduct research, such as the Committee's web site, improve training, or create efficiencies.

The inability to utilize the internet impacts the speed of review and the timing of advice the office provides on everything it does. The failure to provide real time support may ultimately result in decisions and actions by the Department's bureaus that are not legally supportable and subject the Federal Government to liability. Moreover, I believe the loss of connectivity significantly hampers employee morale by fostering an environment where attorneys are literally not "plugged in" to important communications as they occur, hampering retention and recruitment.

Question 4. Do I have your assurance that you will make the New Mexico Indian water rights settlements a priority?

Answer. Yes, Senator, I personally recognize how important addressing these longstanding claims can be to both the economy and future of Indian and non Indian communities within New Mexico. If I have the privilege of being confirmed, I look forward to working with you and your staff on this important issue.

BUREAU OF INDIAN AFFAIRS EMPLOYEES ACCIDENTS

Question 1. Mr. Bernhardt, I believe you are aware that a number of Bureau of Indian Affairs employees in New Mexico have been involved in vehicle accidents, while driving Bureau of Indian Affairs vehicles, during work hours while intoxicated, that have resulted in the unfortunate deaths of private citizens. I know you're aware that the Bureau of Indian Affairs and Department have been working to complete a new policy related to Driving While Under the Influence. And I hope you know that I had written the Department and copied the BIA requesting that that new policy be published by the end of February.

Do you know the status of that new policy?

Answer. It is my understanding that the Bureau of Indian Affairs is working hard to revise its policy on this matter and hopes to have a final policy issued by the end of this month.

By way of background, on January 18, 2006, the Department issued a new Departmental Manual Chapter on Discipline and Adverse Actions, which included a new Table of Offenses and Penalties for the entire Department. This new table includes a specific charge of "Operating a Government vehicle/aircraft while 'under the influence of alcohol'" with a penalty that ranges from a 30 day suspension to removal for a first offense and removal from service for a second offense. The previous Table of Offenses did not include this charge. Instead, it contained the charge "unauthorized use and/or possession of alcoholic beverages while on Government premises (or vehicle)", which included a penalty that ranged from a written reprimand to a 30-day suspension.

Question 2. If you are confirmed as Solicitor it will fall upon your office to defend the agency against claims that could result from future accidents involving Department employees who may drink and drive and get in these accidents.

Answer. That is correct. The Office of the Solicitor and the Department of Justice are responsible for addressing such claims.

Question 3. I would like your commitment that you will impress upon the Secretary the importance of getting this policy updated NOW, so a year from now I am not hearing about Bureau of Indian Affairs or other Department Employees who have killed other motorists during work hours and are being allowed to continue to work for the Department, as has happened in the past. Can I get that commitment from you?

Answer. Yes. As noted in my response to your first question on this subject, the Department has issued new policies regarding sanctions for the operation of government vehicles and aircraft while under the influence of alcohol. Additionally, I have spoken to Associate Deputy Cason who is updating BIA policy in this regard. Senator, I assure you that I will work to ensure that these matters are taken seriously, and that the revised penalties are vigorously enforced.

HYDROPOWER LICENSING

Question 1. EPAct reformed the Federal Power Act's hydroelectric licensing provisions by providing for an expedited trial-type hearing on disputed issues of material fact and allowing any party to offer alternative conditions. The resource agencies (Interior, Commerce, and Ag), in consultation with FERC, issued an interim final rule on November 17, 2005. However, just one month later, American Rivers filed suit in Washington State's western district, challenging the interim hydro rule on the grounds that it applies to pending licensing proceedings and was issued without notice and comment.

Why did the agencies issue an interim final rule rather than go through the traditional notice and comment period?

Answer. I believe the Departments of Agriculture, the Interior, and Commerce decided to publish Interim Final Rules, effective upon publication, for the following reasons described in our Federal Register notice.

The regulations were published as interim final rules with request for comments, and without prior notice and comment, under 5 U.S.C. 553(b)(A) and (B). Under section 553(b)(A), interpretative rules and rules of agency procedure or practice, like the regulations in these interim final rules, do not require a notice of proposed rulemaking. Moreover, under section 553(b)(B), the Departments for good cause found that prior notice and comment were impracticable and contrary to the public interest. Section 241 of the EPAct requires the Departments to promulgate these rules jointly, in consultation with FERC, within 90 days of enactment of the statute. It would not have been possible to meet that deadline if the Departments had to publish a proposed rule, allow the public sufficient time to submit comments, analyze the comments, and publish a final rule, especially given the need for interagency coordination at each step of the process. In addition to meeting the statutory mandate, the Departments found that it was in the public interest to promulgate these regulations promptly, so that (a) parties in hydropower license proceedings could avail themselves of the new trial-type hearing right and alternatives process established in EPAct and (b) delays in the FERC licensing process could be avoided or minimized.

Question 2. What is the status of the litigation? What impact, if any, has it had on the ability of stakeholders to use the new rule?

Answer. The *American Rivers v. DOI* case is pending before the U.S. District Court for the Western District of Washington. By court order, the Department of Justice has until March 15th, 2006 to file a motion to dismiss this action. On March 1, 2006, a second lawsuit was filed in the U.S. District Court for the District of Columbia, *Public Utility District No. 1 of Pend Oreille County v. DOI*. This action challenges the validity of the Department's regulations. Here, in contrast to American Rivers, which asserts that the regulations apply too broadly to pending applications, the PUD asserts that the regulations do not apply broadly enough and should extend to licensees, such as the PUD.

To date, the litigation has had no impact on the ability of stakeholders to use the new rule. The Department is currently processing several trial-type hearing requests and will be conducting its first hearing this summer.

Question 3. Is it possible for the rule to be finalized earlier—perhaps sometime this year?

Answer. Yes. The interim final rule that was published on November 17, 2005 is in effect. The Department did ask for comments in its notice of November 17, 2005 and stated that it would consider revising the Rule within 18 months of its effective date based on comments received as well as the initial results of implementation.

OTHER HYDRO QUESTIONS

Question 1. EPAct's hydroelectric licensing provisions direct the Secretary to give "equal consideration" to such factors as energy supply; distribution; cost and use; flood control; navigation; water supply; and air quality when adopting a condition or prescription under Section 4(e) or 18 of the Federal Power Act. The provisions also permit an applicant or other party to propose alternative conditions/prescriptions.

The resource agencies' interim final hydro rule was issued on November 17, 2005. Although EPAct clearly requires the Secretary to demonstrate equal consideration with "any" condition or prescription it submits under Section 4(e) or 18, the interim final rule is ambiguous as to whether the Secretary must show equal consideration to the various power and non-power factors if no party has proposed an alternative.

Do you believe that the Department must only consider the impacts of a condition or prescriptions on the specified power and non-power factors when an alternative is proposed?

Or do you believe that the statute requires these factors always be considered by the Department in issuing a condition or prescription under Section 4(e) or 18?

Answer. I realize this is an important issue though I have not formed a specific conclusion at this time. The Department is looking into this matter. I would be happy to discuss this matter with you or your staff once I have fully studied the issue, but before reaching a final conclusion or opinion.

Question 2. Will the Department clarify this question in a revised rule?

Answer. The Department is now in the process of reviewing the comments submitted. No decisions have been yet been made on how to proceed, although revision of the existing rule is one means by which more clarity could be provided.

RESPONSES OF MR. BERNHARDT TO QUESTIONS FROM SENATOR BINGAMAN

Question 1. At your hearing, you said that the Department is reviewing how to implement the decision of the U.S. Court of Appeals for the Tenth Circuit in *Southern Utah Wilderness Alliance*, 425 F.3d 735 (10th Cir. 2005). Do you expect this review to lead to the formulation of a rule within the meaning of the Administrative Procedure Act, 5 U.S.C. 551(4) (i.e., "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the . . . procedure, or practice requirements of an agency . . .")?

Answer. After reading the Tenth Circuit's opinion, rendered in September 2005, I believe Secretary Norton felt that the Tenth Circuit provided a well-reasoned, detailed, and comprehensive opinion, which addressed a number of important questions, and she is determined to faithfully follow the law as described by the Tenth Circuit. I do not expect the Department of the Interior's implementation of this decision will result in the formulation of a rule.

Question 2. Section 108 of the FY 1997 Interior Appropriations Act states that

"No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act." 110 Stat. 3009-200.

Do you agree that section 108 prohibits any "final rule or regulation . . . pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477" from taking effect "unless expressly authorized by an Act of Congress subsequent to" September 30, 1996?

Answer. I do not believe that the Department intends to take any action that constitutes a final rule or regulation pertaining to the recognition, management, or validity of a right-of-way pursuant to R.S. 2477. Like Secretary Babbitt's Interim Policy of January 1997, which was issued after the passage of Section 108, if any guidelines for implementation of the legal principles established in the SUWA case are made, I would expect that they would be statements of policy.

When determining whether the Department or a bureau has issued a binding rule or regulation or "merely a statement of policy," we are guided by two lines of inquiry set forth by the Circuit Court of Appeals for the District of Columbia:

One line of analysis focuses on the effects of the agency action, asking whether the agency has (1) imposed any rights and obligations, or (2) genuinely left the agency and its decision makers free to exercise discretion. The language actually used by the agency is often central to making such determinations. The second line of analysis focuses on the agency's expressed intentions. The analysis under this line of cases looks to three factors: (1) the agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private par-

ties or on the agency. *The Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006).

At this time, I believe and anticipate that any policy guidance the Department issues in the near term will leave agencies and decision makers free to exercise significant discretion on this matter and will not impose binding rights or obligations on private parties or any bureau or agency of the Department. I expect that the Department's intent to issue guidance rather than a rule is likely to be expressed in any associated documents.

Question 3. Do you believe that the Department can use its "Disclaimer of Interest" regulations to process R.S. 2477 rights-of-way claims?

Answer. Yes. Authorized by Section 315 of the Federal Land Policy and Management Act, a disclaimer of interest is simply an assertion that the United States' ownership interest in certain lands has terminated or never existed. The Bureau of Land Management's Disclaimer of Interest regulations are published at 43 C.F.R. 1860. Among the United States' interests in land that might have terminated is a public right of way accepted under R.S. 2477.

The *SUWA* case declared that the BLM did not have primary jurisdiction over R.S. 2477 claims such that its determinations would bind courts. I agree with that statement, but note that it does not affect the Secretary's authority under Section 315, which is discussed at length in response to the comments received on our proposed regulations. This makes sense to me because a disclaimer of interest does no more than estop the United States from asserting a claim; it does not purport to bind the courts. Moreover, in my opinion, while the *SUWA* case did not directly address this question, it did impliedly accept the validity of federal disclaimers of interest to R.S. 2477 rights of way. See 425 F.3d at 769, n.20.

Question 4. In a meeting with Colorado County Commissioners, Kit Kimball, Director of External and Intergovernmental Affairs at the Interior Department, recently stated that the Department was developing a new process to determine the validity of R.S. 2477 right-of-way claims. A memorandum she circulated stated that "BLM, applying state law, can make an informal determination regarding the validity and scope of any right of way, which it will then use for planning documents, signage decisions, etc. Bureau could also initiate an informal determination if necessary for internal planning or administration purposes."

- (a) How will these "informal determinations" be made?
- (b) What will be the standard of proof?
- (c) Who will bear the burden of proof?
- (d) Will the public be given notice and interested persons afforded an opportunity to present comments, data, views, and arguments?
- (e) Will the process apply only to lands managed by the Bureau of Land Management or to the National Park System, the National Wildlife Refuge System, and other lands managed by the Department of the Interior?

Answer. Senator, my answer to this question is based on my current understanding of the contemplated process. The Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service (FWS), and the National Park Service (NPS) are all involved in developing this process and there are policy choices and options left to be decided.

The *SUWA* decision holds that title to R.S. 2477 rights of way "passes independently of any action or approval on the part of the BLM" and that BLM does not have "authority to make binding determinations on the validity of the rights of way granted" by R.S. 2477. Ultimately determining who has title to a right of way is therefore a judicial, not an executive, function." Nonetheless, the court recognized that "[t]his does not mean that the BLM is forbidden from determining the validity of R.S. 2477 rights of way for its own purposes. The BLM has always had this authority." See *SUWA*, 425 F. 3d at 757. I believe this is what Mrs. Kimball meant by "informal determinations."

With respect to your questions, the following answers are based on an informal process as I believe it is envisioned by the Department:

- (a) The informal determination would be guided by state law to the extent it is consistent with the purposes of R.S. 2477, looking to whether any proposed improvements to a road are reasonable and necessary under state law. It will also look to whether the right of way was ever abandoned. Even if a right of way is determined to be valid, BLM would retain its duty and obligation to protect the underlying and surrounding federal resources from unnecessary and undue degradation.
- (b) The standard of proof would be that set out in the *SUWA* decision, "preponderance of the evidence." See *SUWA*, 425 F.3d at 750.
- (c) With respect to the burden of proof, if BLM receives a request from a county to improve or otherwise alter the status quo of a road, the burden of proof

will be on the claimant. See *id.* at 768-69. Alternatively, during its own planning process, a BLM office may need to make an informal determination without any specific request from a county. In that case, there would be no party “seeking to enforce rights-of-way against the federal government” on whom to impose a burden of proof, but BLM will nonetheless be guided by the principle that doubts are to be resolved in favor of the government. See *id.*

(d) The public and interested persons will be given notice and extensive opportunities for comment before any determination is made. Data, views, and comments that are relevant to the application of the SUWA standards would be welcomed.

(e) There may be times when NPS or FWS may need to make such a determination for the lands they administer and most of the process they will utilize may likely be similar. I understand that NPS and FWS are just beginning to explore how they will handle these matters as they arise in the future. The Department has had far more R.S. 2477 claims arise with respect to lands administered by BLM than those administered by either NPS or FWS. I am aware of no reason why that should now change.

There will likely be a few differences in the way those principles apply in practice to more sensitive lands, however. For one thing, units of the National Park System and National Wildlife Refuge System have been “reserved for public uses,” and therefore no rights of way could have been established under R.S. 2477 after the date of the reservation for any park unit or refuge area established prior to the repeal of R.S. 2477 in 1976. See *SUWA*, 425 F.3d at 784. Moreover, it may be that previously established rights of way in those areas are more likely to have been abandoned.

Finally, and perhaps most importantly, in my opinion, the standard of care that federal land managers must apply on those sensitive lands is high. As both the Tenth and the Ninth Circuits recently have recognized, land managers are to take reasonable steps to ensure that the use of roads within federal land does not violate the federal landowners’ duty to protect the surrounding and underlying lands, even if the roads are valid rights of way. See *id.* at 747; *Hale v. Norton*, No. 03-36032 (9th Cir. Feb. 9, 2006). This derives from the legal premise that “the easement holder must exercise its rights so as not to interfere unreasonably with the rights of the owner of the servient estate.” *SUWA*, 425 F.3d at 747.

Question 5. How will an “informal determination” of an R.S. 2477 claim’s validity affect the Department’s ability to protect natural and cultural resources that could be harmed by road work on a right-of-way?

Answer. As discussed above, the Department’s obligation and right to protect natural and cultural resources on the lands it manages remains even if a valid right-of-way crosses that land. An informal determination that a claim is valid would not change that; for that matter, neither would a determination that a right-of-way is valid under a disclaimer, Quiet Title action, or Title V or other right-of-way unrelated to R.S. 2477. Moreover, agency review and approval for construction activity other than routine maintenance is required under the analysis in *SUWA v BLM*.

An informal determination that a right-of-way exists would mean that the surface management agency would have to work in consultation with the holder of the right-of-way, rather than unilaterally. I believe working in consultation with local governments is good policy in any event, so even this impact should be minimal. As the court said in *SUWA*, “Both levels of government have responsibility for, and a deep commitment to, the common good, which is better served by communication and cooperation than by unilateral action.” 425 F.3d at 748.

Question 6. How will the road maintenance agreements mentioned in Ms. Kimball’s memorandum impact BLM’s authority to regulate or eliminate motor vehicle use on roads and routes that are subject to the agreement where the restriction or closure is necessary to protect natural and cultural values?

Answer. The BLM’s legal authority to protect natural and cultural resources comes from statute and regulation and would not be impacted by road maintenance agreements. I believe, however, that the BLM’s practical ability to protect those resources will be enhanced by the use of road maintenance agreements. I understand that road maintenance agreements, using various titles, have been used by the BLM for many years, through many administrations. They do not establish any permanent, binding rights to the road. Their purpose is only to allow the parties to preserve the status quo on a road through routine maintenance. If the BLM contemplates severely restricting the use of a road, a road maintenance agreement would not be appropriate. Likewise, if a county wishes to improve a road or use it beyond the current status quo, a road maintenance agreement would not allow it to do so without prior consultation with the BLM.

I expect that the road maintenance agreements that will be used in the future will recognize that, as discussed in my answer to Question #5, the BLM retains its right and duty to protect natural and cultural resources on the surrounding and underlying land. I believe that by creating an agreed-upon method for consultation on such matters, in many cases road maintenance agreements will improve the BLM's ability to regulate motor vehicle use on roads. I also expect that the agreements will allow the BLM to remove a road from an agreement's coverage if necessary. If the county felt that these restrictions violated its valid R.S. 2477 rights, it would either have to convince the BLM through the informal determination process that such rights exist, or, failing that, bring suit under the Quiet Title Act.

Question 7. How do you reconcile these road maintenance agreements with title V of the Federal Land Policy and Management Act?

Answer. Title V of the FLPMA authorizes the Secretary "to grant, issue, or renew rights-of-way" on public lands for certain purposes. 43 U.S.C. § 1761. Road maintenance agreements, as discussed above, have been used for many years for a very limited, and very different, purpose. Road maintenance agreements, far from granting any rights of way, explicitly declare that they do not have the effect of granting or determining the existence of any such rights. Rather, they simply allow a county to perform routine maintenance on a road that the BLM desires to keep open for its own purposes.

Road maintenance agreements would apply to existing roads on public lands where BLM chooses to use them. For existing roads, BLM can maintain them using its own resources or agree for the counties to maintain them. Neither choice by BLM requires any permission under Title V of FLPMA.

Where a county or other applicant seeks either a new right of way or to improve or otherwise expand upon an existing claimed R.S. 2477 right-of-way for which BLM has made an affirmative nonbinding determination, Title V would require a new authorization. Road maintenance agreements do not apply to this latter situation.

THE FUNDAMENTAL PURPOSE OF THE NATIONAL PARK SYSTEM

Question 8. The Department, in its Management Policies for the National Park Service, has taken the position that the National Park Service Organic Act, 16 U.S.C. 1, requires that, "when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant." NPS Management Policies, § 1.4.3 at 12 (2001).

Do you agree with that interpretation of the Organic Act?

Answer. In a February 15, 2006, statement, the Deputy Director of the National Park Service stated that when there is a conflict between the protection of resources and their use, conservation will predominate, while taking appropriate steps, including scientific study and public involvement, to resolve the concerns. The Organic Act, with respect to the purpose of the National Park System, states the "purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." The language quoted in the question is from the 2001 Management Policies, which used the term "conservation is predominant" for the first time.

I understand that similar words and concepts, however, appeared as an interpretation of the Organic Act in policy statements as early as 1918 and have been reiterated fairly consistently through the years. While such policy statements are consistent with the Organic Act, the talented and dedicated attorneys within the Office of the Solicitor have been unable to locate a single case, Solicitor's Opinion, or statute that specifically states that as a matter of law the Organic Act requires, "when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant." Several cases note, however, an overarching goal of resource protection, based on the Organic Act's prohibition against impairment or park resources.

In the statement referred to above, Deputy Director Steve Martin testified before the Congress that, in working on the draft policies, the National Park Service set forth the following guiding principles:

- Comply with current laws, Executive Orders, and regulations,
- Prevent impairment,
- Be responsible for key authorities and decision making,
- Emphasize consultation and cooperation with local, State, and Federal entities,
- Pursue the best contemporary business practices and sustainability,
- Encourage consistency across the system—"one" National Park System,
- Use NPS legacy goals, cooperative conservation and civic engagement as guides,

- Improve the tone so there is no misunderstanding about the NPS's commitment to appropriate use and enjoyment, including education and interpretation, of park resources, while preventing unacceptable impacts,
- When there is a conflict between the protection of resources and their use, conservation will be predominant, while taking appropriate steps, including scientific study and public involvement, to resolve the concerns, and
- Pass on for the enjoyment of future generations all park resources in as good or better condition.

I believe these principles are also consistent with the Organic Act.

SOLICITING DONATIONS FOR THE NATIONAL PARK SERVICE

Question 9. At your hearing, you indicated that the National Park Service's proposed order permitting its employees to solicit donations was supported by a Department of Justice opinion. That opinion appears to be based upon clearly distinguishable circumstances. Moreover, the Justice Department has indicated that the issue must be considered in light of each agency's unique circumstances and authorities.

How do you reconcile the legislative history of the National Park Service's authority and Congress's decision to charter a separate Foundation to solicit gifts for the Park Service with the very different circumstances before the Justice Department? Please provide the Committee with your analysis of the Park Service's authority.

Answer. In my opinion, any donation policies that are developed by the National Park Service must inspire public confidence, demonstrate integrity, and ensure impartiality. It is my understanding that the National Park Service envisions very limited solicitation by its employees. I understand that revisions to Director's Order #21 are in draft and the comment period on those revisions closed on December 5, 2005. Over 1,000 comments on the draft were received.

As I mentioned at the hearing, I was not involved in the development of those revisions. Therefore, I have not exhaustively analyzed this issue. If I have the privilege to be confirmed, I would expect to have the opportunity to review the policies before they are issued in a Director's Order. In the interim, I would be pleased to give this issue greater study and consult with you or your staff before the Office of the Solicitor reviews and clears any final proposal.

Since receiving your question, and after a very preliminary examination, I have found nothing in the history of the National Park Service's authorities that suggests there is, in law, a prohibition on solicitation by National Park Service employees. In his legal writings on this issue, one of my predecessors wrote only that such authority was not explicit on the face of the statute. The legislative history of the act that established the National Park Foundation indicates that the Foundation was established not because Federal employees could not solicit, but rather so that donors would "not be subject to the restrictions and limitations that usually accompany a gift made directly to the Government itself." [House Report No. 623, 90th Congress] House Report 623 does not mention the issue of solicitation at all in its justifications for the need for the Foundation. It does, however, focus on the authority the Act provides in allowing for a broad range of donations and allowing the Foundation to determine its own investment policy and to acquire property for donation to the National Park System.

The National Park Foundation's predecessor, the National Park Trust Fund Board, was established in 1935 by the Act of July 10, 1935 (49 Stat. 477). That Act makes no mention of solicitation at all. The website of the National Park Foundation includes a page entitled "A Tradition of Philanthropy for National Parks" that mentions many important donations to the National Park System prior to the establishment of the National Park Foundation and even the National Park Trust Fund Board. So far, I have found nothing in the law to suggest that those early donations were not made in concert with or at the suggestion of employees of the National Park Service.

As I stated above, the National Park Service has received many comments on the draft revisions and understands the concerns its own employees have expressed with the revisions. I expect there will be changes made to the draft before it is finalized, and I look forward to discussing this issue with you or your staff in the future.

ENERGY CORRIDORS

Question 10. Section 368 of the Energy Policy Act of 2005 directed various agencies, including the Department of the Interior, to "designate, under their respective authorities, corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal land in the eleven contiguous Western States."

In your opinion, does this language require the Department to designate energy right-of-way corridors over or across units of the National Park System, and if so, what is the statutory authority allowing for these corridors?

Answer. Senator, I have not been presented with this question in the past, and to my knowledge, it is not a question that has been reviewed by the Office of the Solicitor. Given the desire to provide you a timely response, I have developed an initial view: Section 368 does not necessarily *require* the Department to designate energy right-of-way corridors over or across units of the National Park System (NPS). Section 368 directs the Secretary, using her existing authority, to designate corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on *Federal land* in the eleven contiguous Western States. "Federal land" is not defined by section 368 or by the Energy Policy Act. It appears that energy corridors may avoid NPS lands entirely if the Secretaries of Agriculture, Commerce, Defense, Energy, and Interior so decide.

The Department of Energy and Department of the Interior have published a notice of intention to conduct public scoping meetings on the subject of corridor designations. This notice appears in the Federal Register at 70 FR 56647 (Sept. 28, 2005).

Moreover, I am not presently aware of other existing authority to permit oil and gas pipelines across NPS lands. The Mineral Leasing Act excludes such rights of way on NPS lands, 30 U.S.C. 185(b)(1), and the NPS appears to lack any such statutory authority.

Question 11. Section 1221 of the Energy Policy Act provides for the siting of electric transmission facilities. Subsection (h)(6) of that section provides that if any agency denies a necessary federal authorization the President has authority to overturn (or uphold) that decision. However, subsection (j) specifically removes the National Park Service from this provision:

"(j) RELATIONSHIP TO OTHER LAWS.—(1) Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)

"(2) Subsection (h)(6) shall not apply to any unit of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Trails System, the National Wilderness Preservation System, or a National Monument." (Emphasis added.)

Do you agree that this section prevents the President from approving the siting of electric transmission facilities within a unit of the National Park System?

Answer. Under the terms of subsection (j)(2), the President's authority under section 1221(h)(6) to review the denial of, or failure to take timely action on, an application for a Federal authorization does not extend to a Federal authorization for use of lands in a unit of the National Park System.

COBELL CASE

Question 12. The *Cobell v. Norton* litigation has been ongoing for a decade now. The court has held that the United States has failed to meet its obligations to hundreds of thousands of individual Indians. This case and the accounting efforts currently being performed are costing the federal government over \$100 million annually.

Will settlement of this litigation be a priority for you? Do you have any thoughts on how it should be settled?

Answer. Yes. I believe resolving this litigation should be a priority for the Solicitor, and if I have the privilege to be confirmed I would make it a top priority. A legislative resolution could address the issue of accounting, and perhaps other issues that are important to Indian Country and United States.

COMITY BETWEEN THE DEPARTMENT AND CONGRESS

Question 13a. At your hearing, you acknowledged the need to give due weight and sympathetic consideration to requests from Members of Congress for information. You also said, in your statement, that you "understand the importance of obtaining meaningful input to help ensure informed Federal decisions." If confirmed

Will you consult with the Committee on significant matters within your responsibility prior to finalizing your actions?

Answer. Yes. I will consult with the Committee on significant matters within my jurisdiction prior to final actions.

Question 13b. Will you give the Committee advance notice of any decision to modify the Department's legal position in pending litigation or any decision to modify,

withdraw, or reverse a Solicitor's Opinion on matters within the Committee's jurisdiction?

Answer. Yes. If I have the privilege to be confirmed, I will consult with the Committee prior to modifying, withdrawing, or reversing a Solicitor's Opinion on any matter within the Committee's jurisdiction. I will also consult with your staff to ascertain particular areas of focus in which the Committee is interested and work with the Committee to ensure that you are informed of decisions to modify our position in pending litigation.

Question 14. Are there any Solicitor's Opinions that you think need to be revised? What Solicitor's Opinions do you expect to review during the remainder of FY 2006 and FY 2007? Please provide a list. What criteria will you use in determining whether an opinion should be modified, withdrawn, or reversed?

Answer. No, I have no plans at this time to review any Solicitor's Opinions. If I am specifically asked to review a particular opinion by the Secretary or the Secretary's subordinate officers, or legal matters arise which necessitate my review of previous Solicitor's Opinions, I will evaluate such matters on a case-by-case basis. I have not developed a defined set of criteria to determine if an opinion should be modified. However, changes in statute or a new court decision could, theoretically, be events that lead to the examination of an existing opinion.

CONSULTATION WITH INDIAN TRIBES

Question 15. Will you consult with an affected Indian Tribe before modifying or withdrawing a Solicitor's Opinion that affects that Tribe?

Answer. Yes. When appropriate, I will consult with an Indian Tribe before modifying or withdrawing a Solicitor's Opinion that directly affects that Tribe.

Question 16. Will you consult with an affected Indian Tribe before settling litigation that affects that Tribe?

Answer. Yes. When appropriate, I will consult with an Indian Tribe before settling litigation that directly affects that Tribe.

RESPONSES OF MR. BERNHARDT TO QUESTIONS FROM SENATOR AKAKA NATIVE HAWAIIANS

Question 1. Public Law 103-150, commonly referred to as the "Apology Resolution," was signed into law in 1993. In summary, the resolution apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893, and calls for reconciliation between the United States and Native Hawaiians.

In 1999, public consultations were held in Hawaii between representatives from the Departments of the Interior and Justice and Native Hawaiians. On October 23, 2000, the Departments released a report about the public consultations with recommendations for additional steps in the reconciliation process.

The reconciliation process is an incremental process of dialogue between the United States and Native Hawaiians to resolve a number of longstanding issues resulting from the overthrow of the Kingdom of Hawaii. The Department of the Interior has had the lead in this process as the agency that deals with indigenous peoples within the United States' jurisdiction. I look forward to working with you on the reconciliation process. I would like to know your thoughts regarding the continuation of this important process between Native Hawaiians and the United States.

Answer. I too look forward to working with you on the reconciliation process. I firmly believe in the importance of continuing to work together on the relationship of Native Hawaiians with the Federal government.

Question 2. The Hawaiian Homelands Recovery Act (Public law 104-42) authorized the transfer of non-ceded federal property to the Department of Hawaiian Home Lands (DHHL) as compensation for the use of 1,200 [acres] of DHHL lands by the United States for the Lualualei Military Communications Field. A Memorandum of Agreement dated August 31, 1998, signed by Secretary Bruce Babbitt, identified non-ceded federal property for transfer to DHHL, including the Waipahu FCC Monitoring Station. A letter of agreement dated November 3, 2000, signed by Assistant Secretary John Berry for Secretary Babbitt established that the Waipahu FCC Monitoring Station, valued in 1989 at \$16.9 million, was not available for transfer to DHHL and a credit in that amount was due to DHHL. As the author of Public Law 104-42, I am interested in implementing the act and ensuring that this matter is appropriately resolved. I would appreciate your thoughts regarding the current status of this situation and how you propose we move forward to resolve this matter.

Answer. I recognize that this is a very important issue to you and to your state. It is my understanding that, as new surplus property becomes available in Hawaii, the recently appointed Director for the Office of Hawaiian Relations, working with the General Services Administration, will notify the State and Department of Hawaiian Home Lands to implement Section 2 (a)(ii) of the MOA. This will be done in order to satisfy the credit of \$16.9 million through the conveyance of Federal surplus property.

COMPACT OF FREE ASSOCIATION

Question 1. P.L. 108-188, the Compact of Free Association Amendments Act of 2003, provides \$30 million in annual funding for Compact impact assistance to be shared between the State of Hawaii, Guam, the CNMI, and American Samoa. While this funding is a positive step forward, it does not begin to reimburse the affected jurisdictions for the costs associated with FAS citizens. Since 1997, when Hawaii began reporting its impact costs, the state has identified more than \$140 million in costs associated with FAS citizens. In 2002, the State of Hawaii expended more than \$32 million in assistance to FAS citizens. In 2003 alone, the state spent approximately \$9.77 million to provide Medicaid services without receiving any federal matching funds. This represents a dramatic increase from \$6.75 million in the state FY 2002.

Funds are currently allocated for five years based on a one-time census.

As demographics shift more rapidly than is reflected in the census, how will you work with the Office of Insular Affairs (OIA) and the affected jurisdictions to ensure that affected jurisdictions are being appropriately reimbursed.

Answer. I have not worked on this issue in the past. If I have the privilege to be confirmed, I would like to work with your staff and the Assistant Secretary of Policy Management and Budget to determine if we can find an acceptable resolution to this important issue.

Question 2. Since 2004, all federal agencies are required to report to DOI regarding their services in the RMI and FSM in order to avoid the duplication of benefits.

What consideration does the Department give to these reports in determining the division of Compact Impact aid, and, if the Department currently does not use the reports as a factor in its determination, would you consider developing a way to incorporate these reports into your calculation of the distributed funds?

Answer. I do not have any personal knowledge of the degree of consideration given to these reports. I have been informed that Public Law 108-188 requires that the allocation of the \$30 million compact impact assistance program be based solely on a census of freely associated state citizens in the U.S. territories and the state of Hawaii. I would welcome the opportunity to work with you or your staff to explore all options and solutions available to the Department of the Interior and you to develop a way to incorporate these reports into the decision making process.

Question 3. The 2003 Amendments contain several new measures that need to be implemented, and this task will fall largely to the OIA staff based in Hawaii that monitor grant assistance, trust funds, and administer Compact Impact funds.

How will the Department ensure accountability with respect to the implementation of provisions in the new Compact, particularly with regard to the administration of grants?

Answer. Senator, I believe accountability is very important. I am not personally familiar with this specific issue; however, I welcome the opportunity to discuss the issue with you or your staff. I have been informed of the following points:

Grant Assistance. Through its Hawaii-based staff, the Department ensures accountability by (1) analyzing compliance with the terms of current grants, (2) reviewing annual sector grant proposals for the next fiscal year, and (3) recommending an allocation of funding for the next fiscal year that reflect changes in relative need and priorities. The joint economic committees, including both United States and Micronesian representatives, consider the above analyses and recommendations and set sector grant amounts.

The Hawaii office provides on-site oversight of Compact programs, requires the timely submission and review of required financial and program reports, and works with the inspector general and GAO to identify and resolve problems.

Trust Funds. Public Law 108-188 provided that independent corporations be established in Washington, D.C. to house the respective trust funds for the Republic of the Marshall Islands and the Federated States of Micronesia. Membership on the respective governing trust fund committees includes representatives from both the United States Government and the two freely associated states. The Hawaii office has no duties with respect to the trust funds.

Compact Impact Funds. The Hawaii office administers the Compact impact grant to the State of Hawaii. Impact grants to Guam and the CNMI are administered from Washington.

ALCATRAZ CONTRACT

Question 1. It is my understanding that on January 6, 2006, the Park Service received guidance from the Department of Labor advising the Park Service that the terms of the Alcatraz contract, which are principally for providing ferry transportation services to Alcatraz Island in San Francisco, CA, are subject to coverage under the McNamara-O'Hara Service Contract Act. Is the Department of the Interior willing to delay awarding the contract until the Department of Labor issues its ruling?

Answer. The National Park Service received the Department of Labor's letter on January 19. The letter states that the Department of Labor has received a request to make a determination concerning the applicability of the Service Contract Act (SCA) to the Alcatraz contract, and asks for NPS's reasons for not including the SCA in the contract. NPS is now in the process of preparing a response, having asked the Department of Labor for an extension of time until March 31, 2006. This extension has allowed the Department of Labor and the Department of the Interior to better understand each other's interpretation of the relevant laws, including not just the SCA but also the NPS Concessions Management Improvement Act of 1998.

With respect to the award of the Alcatraz contract, it is my understanding that the contract cannot be awarded before early May because of the 60-day Congressional notification required by the NPS Concessions Management Improvement Act. If there has not been a resolution of the SCA applicability issue by that time, the National Park Service does not believe that it is necessary to delay awarding the Alcatraz contract because the proposed contract requires the concessioner to comply with all applicable laws, which would include—if subsequently determined—the SCA. However, the National Park Service has the ability to then delay the award of the contract if it chooses. The award of the contract, moreover, will allow the public to benefit from the new concession contract. The solicitation and selection of the new concessioner was upheld in an opinion issued by the Court of Federal Claims on March 6, 2006.

THE OFFICE OF SOLICITOR

Question 1. What is your view of the role of the Solicitor within the Department?

Answer. I view the role of the Solicitor as being the chief legal officer of the Department. In that capacity, the Solicitor serves as the principal legal advisor to the Secretary and is responsible for all legal work in the Department, except that delegated to the Office of Hearings and Appeals, the Inspector General, the Legislative Counsel, and the Justices of the American Samoa.

Question 2. What is your approach to management? What actions do you anticipate with respect to personnel?

Answer. The Office of the Solicitor has many talented and outstanding employees. If I have the privilege to be confirmed, I will look for opportunities to improve operations. I hope to re-establish connection to the Internet. I believe that the Office generally needs to maximize the resources that we have available to us by improving training for staff, increasing our capacities to engage in collaborative legal processes that are less litigation focused, and to improve automation practices.

Overall, if I have the privilege to be confirmed, I anticipate few personnel changes. Like any organization with several hundred people, there are always some individuals entering or leaving the Office at any given time. Moreover, the Office faces a period where many individuals are soon going to be eligible to retire, so the Office must focus on succession planning.

Question 3. Do you believe that career employees at the Department should be able to answer technical questions of the Committee and its staff without pre-approval by political appointees at the Department? If so, will you communicate this view to all employees of the Solicitors Office?

Answer. I believe that career employees at the Department should be able to answer technical questions of the Committee and its staff without pre-approval by the Department's political appointees. However, in accord with the Departmental Manual, the employees must coordinate with appropriate career attorneys in the Department's Office of Congressional and Legislative Affairs. If I have the privilege to be confirmed, I will communicate this view to all employees within the Office of the Solicitor.

COALBED METHANE REPORT

Question 1. Section 1811 of the Energy Policy Act of 2005 requires the Department to enter into an arrangement with the National Academy of Sciences to undertake a report relating to water and coalbed methane production. The NAS report is due back to the Secretary and the Administrator of EPA within 12 months after the date of enactment of EPACT, and the Secretary and the Administrator are to report to Congress within six months after receipt of the NAS report. Can you provide me a time-line for entering into the arrangement with the National Academy of Sciences regarding this report?

Answer. I understand that the Energy Policy Act of 2005 (Act) contains a number of Congressional mandates, many of which have specific deadlines for completion or implementation. In fact, the Act directs the completion of more than 80 tasks by the Department over a period that spans from 45 days to 10 years. Additionally, the Department acts as a cooperating agency on approximately 19 tasks for which other Federal agencies have lead responsibility. The Energy Coordination Council, which was established by the Secretary shortly after the Act's enactment, is responsible for coordinating and tracking the various tasks assigned to the Department under the Act in order to ensure their timely completion. I am advised that the Bureau of Land Management has contacted the National Academy of Sciences (NAS) to discuss the report required under Section 1811 of the Act. Those discussions are focused on developing appropriate parameters for the report and determining the extent to which available data may be used in developing the report. While I cannot provide you with a time line for entering into agreement with the NAS for completion of the report, I will make certain that you continue to be informed of our progress in this regard.

RESPONSES OF MR. BERNHARDT TO QUESTIONS FROM SENATOR THOMAS

Question 1. I understand that on January 6, 2006, the National Park Service received guidance from the Department of Labor advising the Park Service that the terms of the Alcatraz contract, which are principally for providing ferry transportation services to Alcatraz Island in San Francisco are subject to coverage under the McNamara-O'Hara Service Contract Act. Please provide the Committee with the reasons why the Department of Interior believes the Service Contract Act does not apply to the Alcatraz contract.

Answer. The National Park Service received the Department of Labor's letter on January 19. The letter states that the Department of Labor has received a request to make a determination concerning the applicability of the Service Contract Act (SCA) to the Alcatraz contract, and asks for NPS's reasons for not including the SCA in the contract. NPS is now in the process of preparing a response, having asked the Department of Labor for an extension of time until March 31, 2006. This extension has allowed the Department of Labor and the Department of the Interior to better understand each other's interpretation of the relevant laws, including not just the SCA but also the NPS Concessions Management Improvement Act of 1998.

I am informed that the position of the National Park Service may be based upon the following points:

- Congress has directed the Secretary to "utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System." 16 U.S.C. § 5952.
- Concession contracts are like leases or licenses authorizing the private sector to provide services to park visitors, not like Federal procurement or service contracts.
- Congress indicated its intent that NPS concession contracts "do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise." See NPS Concessions Management Improvement Act of 1998 ("1998 Concessions Act") and its legislative history, especially S. Rep. No. 202, 105th Cong., 2d Sess. 39; *accord*, H.R. Rep. No. 767, 105th Cong., 2d Sess. 43 (1998).
- Consistent with the 1998 Concessions Act and the longstanding NPS position, the NPS promulgated regulations in 2000 to make clear that "[c]oncession contracts are not . . . service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions." 36 C.F.R. § 51.3.

The Departments of the Interior and Labor are currently in discussions examining how best to interpret their respective laws to effectuate Congressional intent.

Question 2. Please provide the Committee with the reasons why the Department of Interior is unwilling to delay the award of the new Alcatraz contract until after

the Department of Labor rules on the applicability of the Service Contract Act to the Alcatraz Contract.

Answer. The National Park Service received the Department of Labor's letter on January 19. The letter states that the Department of Labor has received a request to make a determination concerning the applicability of the Service Contract Act (SCA) to the Alcatraz contract, and asks for NPS's reasons for not including the SCA in the contract. NPS is now in the process of preparing a response, having asked the Department of Labor for an extension of time until March 31, 2006. This extension has allowed the Department of Labor and the Department of the Interior to better understand each other's interpretation of the relevant laws, including not just the SCA but also the NPS Concessions Management Improvement Act of 1998.

With respect to the award of the Alcatraz contract, it is my understanding that the contract cannot be awarded before early May because of the 60-day Congressional notification required by the NPS Concessions Management Improvement Act. If there has not been a resolution of the SCA applicability issue by that time, the National Park Service does not believe that it is necessary to delay awarding the Alcatraz contract because the proposed contract requires the concessioner to comply with all applicable laws, which would include—if subsequently determined the SCA. However, the National Park Service has the ability to then delay the award of the contract if it chooses. The award of the contract, moreover, will allow the public to benefit from the new concession contract. The solicitation and selection of the new concessioner was upheld in an opinion issued by the Court of Federal Claims on March 6, 2006.

RESPONSES OF MR. BERNHARDT TO QUESTIONS FROM SENATOR SALAZAR

Question 1. I understand the Department of the Interior has been working to create a process to define local governments' rights and responsibilities in maintaining rights of way which fall under RS 2477. As you know, the RS 2477 issue has been a major point of contention among federal land managers, private property owners, and local and state officials in our home state of Colorado.

Please give a brief description of the process, as it exists in the Department's current draft.

Answer. As a native of rural Colorado myself, I am well aware of the longstanding contentiousness surrounding R.S. 2477. The Tenth Circuit Court of Appeals recently noted, "the definition of R.S. 2477 rights of way across federal land, which used to be a non-issue, has become a flash point, and litigants are driven to the historical archives for documentation of matters that no one had reason to document at the time." *SUWA v. BLM*, 425 F.3d 735, 742 (10th Cir. 2005). I believe that Secretary Norton read the Tenth Circuit's opinion and is determined to faithfully follow the law as described by the Tenth Circuit.

I believe the Secretary other Department policy makers are looking to utilize approaches that seek to find consensus wherever possible by encouraging cooperation and communication between the Federal government, local governments, and the public. However, the Secretary has not issued any policy statement to date, and the Department has not completed the development of the process described in your question. I understand that the National Park Service, U.S. Fish and Wildlife Service, and the Bureau of Land Management are developing processes to implement the principles laid out in the *SUWA v. BLM* decision.

In general, I believe the Department is considering plans to apply the standards laid out by the Tenth Circuit in *SUWA v. BLM*, recognizing this will mean that the actual decisions regarding the validity and scope of R.S. 2477 rights of way will mainly be guided by state law. Where the parties agree that the status quo is appropriate for a given set of roads, they may wish to enter into road maintenance agreements that will allow routine maintenance. I expect that where an informal determination of a claim is necessary, the burden will be on the claimant, if any, to show by a preponderance of the evidence that the right of way claim is valid. Moreover, even though neither approach would create permanent binding rights, I expect that the Department would seek public comment before finalizing either a road maintenance agreement or a nonbinding determination.

Question 2. What sort of notice does the Department intend to offer interested stakeholders, including federal land managers other than BLM staff, private property owners, local and state officials about this process?

Answer. Again, I do not believe the details of the process have been finalized, but I believe the public will be afforded notice and an opportunity to comment before any final nonbinding determination is made or any route is covered by a road maintenance agreement. If a route across land managed by an Interior Department bu-

reau also crosses private land or land managed by another government entity, I expect the bureau would also give notice specifically to that land manager or owner.

Question 3. Will there be opportunity for public comment?

- a. In what form?
- b. When and for how long?
- c. How long will potential claimants have an opportunity to appeal the implementation of this process?

Answer. I do not believe that any particular pathway has been prescribed, and I expect that the details of the form of comment may differ depending on what information the decision maker needs in order to make a fully informed decision under the circumstances. At the very least, I believe it would include publication of the contemplated action on the bureau's website and in local news outlets, as well as the specific notice to affected landowners. If a decision is straightforward and related only to one or a small number of roads, it may be reasonable for the time for comments to be short. For larger and more contentious proposals, the time and format for comments would be longer.

Due to its nonbinding nature, an adverse informal determination may not, by itself, create a final agency action subject to appeal. If, however, the adverse determination led to an action such as closure of a claimed right of way, I expect the usual statutes of limitation would apply.

Question 4. What form of assurances does the Department intend to offer to private property owners whose lands may be subject to disputed RS 2477 claims?

Answer. I expect that the Department will direct bureaus to develop safeguards to ensure that their implementation of these principles does not infringe on the rights of private landowners whose land may be crossed or abutted by claimed rights of way. I do not believe that the Department plans to make any administrative determination regarding an R.S. 2477 right of way on private lands. Moreover, because our informal determinations are not afforded deference by courts, any determination we make regarding a right of way are only for planning purposes on land we manage, and should have no effect on private property. In order to minimize the risk of disputes, however, ideally land managers would seek to directly give notice to any such landowners. I expect the Department will also seek to make available to private property owners and the public maps and other information in its possession that may help a landowner assess the validity of a claim regarding his or her property.

Question 5. As you know, in the *Southern Utah Wilderness Alliance v. BLM* opinion, the 10th Circuit cited the 1996 appropriations provision that prohibits the Department from issuing final rules governing RS 2477:

No final rule or regulation of any agency of the Federal Government pertaining to the *recognition, management or validity* (emphasis added) of a right-of-way pursuant to Revised Statute 2477 (43 USC 932) shall take effect *unless expressly authorized by an Act of Congress* subsequent to the date of this Act [Spt. (sic) 30, 1996].

The only information that I have seen regarding the new processes under consideration by the Department specifically refers to "*validity and scope determinations* for administrative purposes." Do you agree that the Department is prohibited from implementing these new procedures unless expressly authorized by Congress? If not, why not? Will you provide the specific legal basis for your position to the committee in writing?

Answer. I do not anticipate the Department's potential actions will involve a final rule or regulation prohibited by that provision. When determining whether the Department or a bureau has issued a binding rule or regulation or "merely a statement of policy, we are guided by two lines of inquiry" set forth by the Circuit Court of Appeals for the District of Columbia:

One line of analysis focuses on the effects of the agency action, asking whether the agency has (1) imposed any rights and obligations, or (2) genuinely left the agency and its decisionmakers free to exercise discretion. The language actually used by the agency is often central to making such determinations. The second line of analysis focuses on the agency's expressed intentions. The analysis under this line of cases looks to three factors: (1) the agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency.

The Wilderness Soc'y v. Norton, 434 F.3d 584, 595 (D.C. Cir. 2006).

I believe that any policy guidance the Department issues on this matter will leave agencies and decisionmakers free to exercise significant discretion, and will not impose binding rights or obligations on private parties or any bureau or agency of the Department. The Department's intent to issue guidance rather than a rule will be expressed in any associated documents.

Question 6. The Southern Utah Wilderness opinion holds that the Department of the Interior has no authority to determine the legal validity of an R.S. 2477 claim?

Do you agree that this is one holding of that decision?

Do you agree, therefore, that a road maintenance agreement entered into between BLM and a county government does not mean that the R.S. 2477 claim of that county has any legal validity? That maintenance agreement doesn't make the R.S. 2477 claim any stronger or any weaker than it was the day before the maintenance agreement was signed, correct? The maintenance agreement is irrelevant to the ultimate legal validity of the county's R.S. 2477 claim, right? And, in the same way, BLM could refuse to enter into a road maintenance agreement with a county, and that refusal would also leave the county's legal claim to an R.S. 2477 right of way unimpaired, correct?

Answer. *SUWA* holds that title to R.S. 2477 rights of way "passes independently of any action or approval on the part of the BLM" and that BLM does not have "authority to make binding determinations on the validity of the rights of way granted" by R.S. 2477. 425 F.3d at 754, 757. Nonetheless, the court recognized that "[t]his does not mean that the BLM is forbidden from determining the validity of R.S. 2477 claims for its own purposes. BLM has always had this authority." *Id.* at 757.

I agree with your analysis of the effect of a road maintenance agreement on the validity of an R.S. 2477. I do not believe that the entering into, or refusing to enter into, a road maintenance agreement will have any effect on the ultimate question of ownership of any interest in a road. In fact, my understanding is that road maintenance agreements will explicitly state that they do not affect the ownership of any interest in the subject roads, and do not prejudice the right of the county to subsequently assert R.S. 2477 rights of way or the right of the BLM to assess or defend against any such assertion.

Question 7. In a footnote, the Southern Utah Wilderness opinion refers to a memorandum from the Secretary of the Interior stating that BLM can make non-binding administrative determinations of RS 2477 rights where there was "a demonstrated, compelling, and immediate need . . .," while leaving the final determination of such rights to the courts. Do you agree that any administrative determinations of RS 2477 rights made by BLM or any other federal agency are "non-binding?"

Answer. Yes. As the *SUWA* court noted, these administrative determinations are useful for an agency's own planning purposes, and while they may "be of use to [a] court" should the issue arise in litigation, they are not binding on courts. See 425 F.3d at 757.

Question 8. Rep. Mark Udall prepared a letter to Secretary Norton (attached) with a series of questions about the Department's R.S. 2477 determination process. To my knowledge, Mr. Udall has not received a response from the Secretary's office. In your current capacity, have you reviewed and prepared a response to Mr. Udall's letter? What is the status of the Secretary's response to Congressman Udall's letter?

Answer. I and a number of other staff from the Department have carefully reviewed Congressman Udall's letter. In my opinion, Congressman Udall's letter was very helpful. As part of our normal correspondence process, I believe the Department will respond to the Congressman's letter. I am also informed that the Office of Congressional and Legislative Affairs has arranged a meeting between Congressman Udall's staff and Department personnel to discuss in person the Congressman's views on this subject. Similarly, we have received a number of helpful letters from representatives of private property owners, local governments, and groups such as Earthjustice, The Wilderness Society, and the Southern Utah Wilderness Alliance itself. I have personally spoken to representatives of several of these groups. Their comments and perspectives have also been appreciated.

